

Aide-de-Camp's Library



सत्यमेव जयते

Rashtrapati Bhavan
New Delhi

Accn. No. 338

Call No. IX (a) - S

Treaties, Engagements and *Sanads* *of* INDIAN STATES

A CONTRIBUTION IN INDIAN JURISPRUDENCE

By

K. R. R. SASTRY, M.A., M.L.

READER, LAW DEPARTMENT, UNIVERSITY OF ALLAHABAD;
ADVOCATE, MADRAS HIGH COURT; MEMBER, GROTIUS
SOCIETY (LONDON)

Author of

International Law 1937; *Indian States and Responsible
Government* 1939; *Paramountcy and State Subjects*, 1941;
Indian States, 1941

PUBLISHED BY THE AUTHOR

Price Rs. 10—Inland

15 sh.—Foreign

COPYRIGHT WITH THE AUTHOR

PRINTED BY J. K. SHARMA AT THE ALLAHABAD LAW JOURNAL PRESS
ALLAHABAD

AUTHOR'S PREFACE

While continuously engaged in studies of several aspects of the problems of Indian States for the past seven years, it appeared that a *complete analytical examination of the several Treaties, Engagements and Sanads* had not been done thus far. No work has been written which subjects these treaties, engagements, and *Sanads* to a process of *analysis* and interpretation.

Certain aspects of the problem of *Indian States vis-a-vis* responsible Government in India have been attempted in a work of the author published in 1939.* The all-absorbing question of *Paramountcy and State-subjects* had been chosen by this writer for the Sayaji Rao Gaekwar Golden Jubilee Memorial Lectures at Baroda in 1940-41. An *objective* examination of these treaties, engagements and *Sanads* was then found to be a fit topic for legal study.

New conceptions in the post-War era (1918-1939) bear abundant testimony to the ingenuity of statesmen; and juristic ideas have to keep pace with novel experiments as the League of Nations and Mandates. India is only semi-sovereign with an anomalous status, and the Indian States can be assigned a status which is *sui generis* and *quasi-international*. Thus problems relating to the position of Indian States cannot be satisfactorily discussed with reference to purely juristic criteria.

*K. R. R. Sastry. *Indian States and Responsible Government*, 1939.

The chapter on implications of paramountcy has had to be introduced; otherwise an erroneous conception would be given to the foreign observer faced only with treaties and engagements between two states. The treaty relationship started between allies, one of whom grew up into a position of Paramountcy, established through the right of "conquest, operating by assumption and acquiescence."

This branch of juristic study has got all the characteristics of a combination of law and politics. The branch which is *ex facie* contractual has alone been selected for examination.

The author is indebted to several leading lawyers in India for helpful suggestions. Conclusions and opinions in the study are entirely his.

All students of "Indian States" are indebted to the monumental works of Aitchison, Sir Lewis Tupper and Sir W. Lee Warner. Besides the books consulted in the Allahabad University and Madras Law College, the author is under obligation to the valuable collection of books at 19, Albert Road, Allahabad.

January 1, 1942
University of Allahabad
Law Department

K. R. R. SASTRY

CONTENTS

CHAP.	PAGE
Author's Preface	3
Select Bibliography	7
Table of Cases	13
I. Introductory	15
II. Historical background	19
III. Analysis of Treaties, Engagements and <i>Sanads</i>	85
IV. Nature and Status of Indian States	199
V. Implications of Paramountcy	232
VI. Canons of Interpretation	255
VII. Interpretation of Treaties, Engagements and <i>Sanads</i>	281
Examination of Some Disputes	282
VIII. Conclusions	306
Index	313

SELECT BIBLIOGRAPHY

- Aitchison .. *A Collection of Treaties, Engagements and Sanads*, IV Ed. 1909 and V Edition.
- American Journal of International Law.*
- Anson .. *Law and Custom of the Constitution*, Oxford. 1922.
- Arnold, Sir Edwin *Administration of Lord Dalhousie.*
- Banerji, Sir A. R. .. *The Indian Tangle.*
- Barton, Sir W. .. *The Princes of India.*
- Basu .. *Story of Satara.*
- Blackstone .. *Commentaries*, I.
- Borchard .. *The Diplomatic Protection of Citizens abroad—1915.*
- Brierly .. *Law of Nations*, II Ed.
- Briggs .. *The Nizam, his history and relations with the British Government*
—2 Volumes.
- British and Foreign State-Papers—Vol. 89.*
- British Crown and the Indian States.* London 1929.
(Chamber of Princes)
- British Yearbook of International Law*, 1925, 1930, 1934.
- Bryce .. *International Relations.*
- Cheshire .. *Private International Law*, 1938
II. Ed.
- Chudgar .. *Indian Princes.*
- Colebrooke .. *Letters and Life of M. Elphinstone*
Vols. I and II.

- Crandall .. *Treaties, Their making and enforcement*, II Ed.
- Cunningham .. *History of the Sikhs*.
- Curzon .. *Leaves from a Viceroy's Notebook*.
- Evatt .. *The King and His Dominion Governors*.
- Forrest, G. W. .. *Selection of State Papers in Foreign Dept.* Vols. I and II.
- Foote .. *Private International Law*.
- Fraser (Genl.) .. *Memoirs and Correspondence*.
- Frazer .. *Nizam—Our Faithful Ally*.
- Griffin, Lepal H. .. *The Rajas of the Punjab*, 1870.
- Grotius. H. .. *De Jure Belli ac Pacis*, Carnegie Publication (Translation) 1925.
- Grotius Society* .. Transactions of the
- Gense and Banerji .. *The Gaikwads of Baroda*, Vols. I to V.
- Hall .. *Foreign Powers and Jurisdiction of the British Crown*, 1894.
- Hall .. *International Law*, VI and VIII Editions.
- Halsbury .. *Encyclopaedia of the Laws of England*, Vol. 10.
- Holland .. *Lectures on International Law*.
- Hope John .. *House of Scindia*.
- Ilbert .. *The Government of India*, III Ed.
- Jenkins .. *British Rule nad Jurisdiction beyond the Seas*, 1902.
- Jones, B. S. .. *Papers relating to the progress of British Power in India and the system of Subsidiary Alliances*.

- Kaye .. *Life and Correspondence of Charles Metcalfe*, Vols. I and II.
- Kaye .. *John Malcolm*, Vols. I and II.
- Keith .. *The King and the Imperial Crown*.
- Latthe, A. B. .. *Problems of Indian States*.
- Lauterpacht .. *Private Law Sources and Analogies of International Law*.
- Lawrence .. *International Law*.
- Lee Warner, Sir W. .. *The Native States of India*.
The Life of the Marquess of Dalhousie—2 Vols.
- Low, Sir Sydney .. *Indian States and the Ruling Princes*.
- Macmunn, Sir G. .. *Indian States and Princes*.
- Malcolm, Sir J. .. *Central India*, Vols. I and II.
- Martin .. *Despatches, Minutes and Correspondence*, 4 Vols.
- Maxwell .. *Interpretation of Statutes*, 1929.
- McNair, A. D. .. *Law of Treaties*, 1938.
- Mehta .. *Lord Hastings and the Indian States*.
- Minto (Countess of) .. *India, Minto and Morley*.
- Moore .. *Digest of International Law*, 8 Vols.
- Mukherjea .. *Indian Constitutional Documents*.
- Nicholson .. *Scraps of Paper*.
- Oppenheim .. *International Law*, Vols. I and II,
V Ed.
- Owen .. *Wellesley Papers*.
- Panikkar .. *Indian States and the Government of India*, 1927.
British Policy towards Indian States.
Indian Princes in Council, 1936.
Interstatal Law.
- Philips, C. H. .. *East India Company*, 1784-1834.

- Phillimore .. *International Law*, 4 Vols. 1854-61
 Phillimore .. *Three Centuries of Treaties of Peace*, 1919.
 Piggott .. *Ex-territoriality*, 1892.
 Extradition.
 Pitt-Cobbett .. *Leading Cases in International Law*,
 V Ed., 2 Vols.
 Princep .. *Military and Political Transactions*
 in India during the administration
 of Marquess of Hastings.
 Raghunir Singh .. *Indian States*.
 Ruthnaswamy, M. .. *Administrative System in India*.
 Ronaldshay .. *Curzon*, Vols. I and II.
 Ross .. *Cornwallis Correspondence*.
 Rice .. *Sayaji Rao III*, Vols. I and II.
 Sastry, K. R. R. .. *International Law*, 1937.
 Indian States and Responsible Govt.
 1939.
 Sen, D. K. .. *Indian States*.
 Sivaswamy, Sir P. S. *Indian Constitutional Problems*.
 Stowell .. *Intervention in International Law*
 1921.
 Stubbs .. *Suzerainty*, 1882.
 Tupper, Sir C. .. *Our Indian Protectorate*, 1893.
 Twiss .. *Law of Nations*, 1884.
 Varadachariar, N. D. *Indian States in the Federation*.
 Varadarajan, M. K. *Indian States and the Federation*.
 Vattel .. *Le Droit Des Gens*, English Trans.
 3 Vols. 'Carnegie Publication
 1916.
 Westlake .. *International Law*.
 Collected Papers.

- Wheaton .. *International Law*, IV and VI Eds.
Williams, Sir J. F. .. *Chapters on Current International
Law and League of Nations.*

RECORDS AND REPORTS

Indian States Committee. (Butler)

Indian States Enquiry Committee. (Financial)

Joint Parliamentary Committee.

Orissa Reforms Enquiry.

Montagu-Chelmsford Report on Indian Constitutional Reforms.

Reforms Enquiry—Hyderabad. 1938.

Constitutional Reforms in Mysore. 1939.

Selection of Records of East India House Judicial Vol. I.

Minutes of Evidence on Affairs of E. I. Coy., 1832.

Report of Select Committee on Affairs of E. I. Coy., 1832.

Copies of *Treaties and Engagements*, 1853. Printed in return to an order of the House of Lords.

Maine's *Minute on the Kathiawar States*, 22 March 1864.

Memoranda on Indian States, 1937, 1940.

Private Journal of the Marquess of Hastings.

House of Commons Debates, 1935.

Minutes of Evidence of Select Committee, 1853.

TABLE OF CASES

	PAGE
<i>Attorney General v. De Keyser's Royal Hotel Ltd.</i> 1920	
A. C. 508	247
<i>Attorney General for Canada v. Attorney General for</i>	
<i>Ontario and others</i> , 1937 A. C. 326	89
<i>Besset's Case</i> 6 Q. B. 431	139
<i>Cristina</i> 1938 A. C. 485	230
<i>Dadri Prasad v. Dt. Magistrate, Yeotmal</i> , 77 I. C. 23	150
<i>Damodhar Gordhan v. Deoram Kanji</i> , I. B. 367 P. C.	81
<i>Doss v. Secretary of State</i> , 19 Eq. 509	25
<i>Duff Development Company v. Government of Kelantan</i>	
1924 A. C. 797.	213
<i>East India Coy. v. Syed Ally</i> 7 M. I. A. 555	25
<i>Elphinstone v. Bedrachand</i> 1 Knapp. P. C. 316	25
<i>Empress v. Keshab Mahajan and Others</i> , 8 C. 985	223
<i>Frith v. Queen L. R.</i> 7 Eq. 365	25
<i>Foster v. Neilson</i> 1829. 2. Peters. 253	86
<i>Gibson v. East Indian Company</i> 5 B. N. C. 262.	25
<i>Hansraj v. The Crown</i> 7. L. 159	151
<i>Hossain Ali Mirza v. Abid Ali Mirza</i> 21 C.	
177	227
<i>Kothakota Venkatramireddi v. Sri Maharaja Seetha-</i>	
<i>ram Bhupal Rao and Others</i> 53 M. 968	214
<i>Laconia</i> 2 Moor. P. C. N. S. 183	243
<i>Mathen—C. P. In re.</i> 1939 M. 128.	151
<i>Muhamad Yusuf-ud-din v. Queen Empress</i> 24. I. A.	
137	134-136

<i>Murlidhar Bhagwan Das</i> , In re. 43. B. 310	150
<i>Nabob of the Carnatic v. East India Company</i> 2 Ves. 56	25
<i>Oder</i> , The P. C. I. J. Series A. No. 23	263
<i>Queen Empress v. Abdul Lateef</i> —10. B. 186 ..	206
<i>R. v. Christian</i> 1924. South Africa. L. R. (A. D.) 101	213
<i>Raja of Coorg v. East India Company</i> 29. Beav. 300	25
<i>Raja Saligram v. Secretary of State</i> 12 Beng. L. R. 167	25
<i>Regina v. Sheikh Bodin</i> , Perry's Oriental Cases ..	25
<i>Sandal Singh v. D. M. and Superintendent, Dehra Dun</i> 56 A. 409	151
<i>Satrugna v. Savitri</i> 2 Knapp. 287	138
<i>S. of S. for India v. Kamatchee Boye Saheba</i> , 7 M. I. A. 476	25
<i>Sirdar Gurdayal Singh v. Rajah of Faridkot</i> 1894 A. C. 670	226
<i>Statham v. Statham etc.</i> 1912 P. 92.	217
<i>Triccam Panechand v. B. B. and C. I. Ry.</i> 9 B. 244 81-188	
<i>Venkatrangiengar v. Government of Mysore</i> 39 Mysore H. C. R. 485	151
<i>Walker v. Baird</i> 1892. A. C. 691	90

CHAPTER I
TREATIES, ENGAGEMENTS AND *SANADS*
OF INDIAN STATES

A Contribution in Indian Jurisprudence

INTRODUCTORY

Under the latest publication of the Government of India,¹ there are 601 states, Jagirs and estates in India. How these have swelled into such a number and variety has been sketched in general accuracy in the monumental volumes of Aitchison.² The viewpoint of the Government of India has been generally indicated in the valuable historical and introductory notes of these volumes.

While Sir Lewis Tupper has done a distinct service through his publication in 1893 of "*Our Indian Protectorate*," the authoritative volume by Sir W. Lee Warner is also bound to help every student in understanding the growth and development of political practice as altering slowly the clauses in the old treaties.³

Serene international lawyers like Phillimore, Westlake and Hall, as also illustrious jurists as Pollock and Holdsworth have had to examine the status and the constitutional *nexus* binding the states with the Crown.

¹ *Memoranda on Indian States*, 1940.

² Aitchison, XIV Volumes of *Treaties, Engagements and Sanads* V Edition.

³ Lee Warner. "*The Native States of India*" II Ed.

Purely for the purpose of strengthening their position, the wonted lethargy of Indian States was disturbed when the appointment of the Indian States' Committee¹ was announced. Eminent lawyers and well-known jurists were engaged by the Princes to put their case before the Committee. As a consequence, books with just a bias for the princely Order have also been published.²

More particularly since the publication of the famous Montagu-Chelmsford Report,³ the repercussions of the introduction of Constitutional Reforms in British India were anticipated to affect conditions in Indian States. After the Government of India Act (1935) was brought into operation in the Provinces, mass agitation for reforms was started in many of the Indian States getting open and sometimes veiled support from the greatest political organization in British India. In support of such a movement for the betterment of States' subjects statements like the following have been indulged in, that "it is ridiculous to say that these Indian States entered into alliance with the British Government as independent units on terms of equality."⁴

A full analytical study of these treaties, engagements and *Sanads* has not been made. Valuable as have been the work of political mentors of Government of

¹ Also called the *Butler Committee*: 1928-29.

² Nicholson. '*Scraps of Paper*.'

D. K. Sen '*Indian States*.'

K. M. Panikkar. '*British Policy towards Indian States*.'

Low, Sir Sydney. '*The Indian States and the Ruling Princes*.'

³ Vide The Montagu-Chelmsford Report. Para 157.

⁴ Article by Dr. K. N. Katju, ex-Congress Minister, dated 7-8-40 in the '*Hindu*', a leading daily of Madras.

India on the one hand and the views of progressive politicians of the present on the other, unhappily, these interpretations have been either characterized by political expediency or a passionate yearning for a new order which would distort the past. No work has been written which subjects these treaties to a process of analysis and interpretation.

A dispassionate study in the true historical background will serve students and statesmen alike who have to understand the unparalleled relationship that has grown between Indian States and the Paramount Power.

There is an insuperable difficulty in the path of the enquirer, for "none of the records of the Political Department which one would wish to consult are open to inspection by the general public."¹ The scope of the present study is not likely to suffer much, thanks to Aitchison's volumes which contain treaties, engagements and *Sanads* till 1928. The courtesy shown to the present writer by some leading Indian states through supplying authentic copies of agreements of 1936 and *Sanads* of 1937 has made it feasible to make the study as up-to-date as possible. What were found in dusty archives and inaccessible rooms have been unearthed and systematized in the valuable Davidson Committee's Report.

In these 601 states, all varieties and shades of internal administration ranging from well-pronounced internal autonomy to maximum administrative control by the Paramount power are found. Forty states have

¹ Reply to this writer from the Political Department, Government of India, in a letter dated 10th January 1940.

treaty relationships; in the rest there are engagements and *Sanads* binding the states with the Paramount Power.

It is sometimes remarked that out of 601 states only 40 states have treaties and hence this stress on the binding character of treaties is done over-much. A few facts will dispel this fundamental misconception based on an alleged illusion of mere numbers. Of 601, there are more than 327 petty estates, Jagirs and others; 286 out of the foregoing are organized in groups called *Thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of criminal, revenue, and civil jurisdiction. Taking again the level of administration, thirty states alone have Legislative Councils. Forty states have High Courts. Fifty-six states have a fixed privy purse. Forty-six states have a graded civil list of officials. Fifty-four states have pension or provident fund schemes. A comparison by area is equally intriguing. The area of 178 states is from ten to hundred square miles each; two hundred and two states have each an area of less than 10 square miles.

A comparative study of statistics of population reinforces the fact that out of a total population of 81,310,845¹ for the whole of Indian States, forty Treaty States have a population of 54,727,582. More than two-thirds of the total population of Indian States is found in states governed by treaties. Viewed thus from any relevant point, the states governed by treaties constitute among the most important of Indian states.

¹ 1931 Census.

CHAPTER II

GENERAL HISTORICAL BACKGROUND

Commerce had been the origin of the East India Company, since it owed its origin to an exclusive charter of privilege granted by Queen Elizabeth on the last day of the year 1600.¹ The Association to trade with the East Indies was formed in 1599; these 220 gentlemen and merchants were constituted "as one body corporate and politic by the name of the Governor and Company of the Merchants of London" to trade with the East Indies. The Company's first factory was at Surat. In 1624, a *Farman* was obtained from the Moghul Emperor Jehangir, permitting the English to trade with Bengal but restricting them to the port of Pipili in Midnapur. "On the Coromandel Coast, the agency at Metchlipatam was first established in 1611. In 1639, territory at Madras was acquired from a local Naick. This grant was confirmed by the Raja of Vijayanagar and a new settlement was founded in Madraspatnam in 1640, which received the name of Ft. St. George. The regular connection of the company with Bengal, however, did not commence till 1642 when a factory was established at Balasor; and in 1652 permission was obtained for unlimited trade, without payment of customs on an an-

¹ M. Ruthnaswamy. "*British Administrative System in India.*"
p. 1.

nual payment of Rs. 3000.”¹ In 1661, Charles II granted a new charter vesting the company with power to make peace or war with any Prince not Christian and to seize and send to England unlicensed traders. A fresh charter was again granted in 1693, confirming the exclusive privileges of the Company for 21 years. In 1698, a rival company was formed, known as the new or English Company which amalgamated with the old ‘London Company’ in 1702 and the two companies united into one Society called “the United Company of merchants of England trading to the East Indies.” Though there was opposition in 1713 the Company acquired the right of exclusive trade for a period of 20 years till 1733, which right was renewed every 20 years till 1773 when the Regulating Act was passed. From 1773, the era of parliamentary control over the affairs of the Company began. Through periodical renewals once in twenty years, the Charter was renewed till 1833, when the charter of that year deprived the company of its monopoly of Indian trade. No wonder that a remarkable political genius as the Marquess of Wellesley, fretted against the commercial policy of his masters thus:—“India was ruled not from a palace but a counting house; not with the ideas of a prince, but with those of a retail dealer in muslin and indigo.”²

The East India Company’s machinery to carry on negotiations with country powers and the manner in which a trading company forced its way into politics have to be indicated. The company appointed agents

¹ *Aitchison*: Vol. I, IV Ed. p. 173.

² Wellesley’s ‘*Despatches and Letters*’—Ed. Martin 1802.

of the Governments of the Presidencies for pursuing negotiations with the indigenous powers. These were called Residents; and "the political Residents of later times were descended officially from the Commercial Residents that were the Commercial Agents for the Company's trade."¹ Thus, when Warren Hastings was appointed Resident at Murshidabad in 1758, he had to study the intricate political schemes of parties at Court, the working of the "Native administrative bodies and the effect upon them of the new anomalous influence which the English had obtained by their victory."² Sometimes, Commercial Residents became separate from political Residents after 1800. With the disappearance of the Commercial Residents after the cessation of the Company's commercial activities, they left to their successors, the political residents, the legacy of their methods of work.

"The use of private commercial corporations in the founding of a colonial empire is a typical English way."³ As Prof. Ruthnaswamy has well pointed out, "it was not in a parliamentary speech or in a despatch from the Board of Commissioners but in a letter from one provincial government to another that the responsibilities of Empire are brought home to the Company's government in India."⁴ The official document records that "the company is bound by the obligations inseparably

¹ M. Ruthnaswamy *'British Administrative System in India,'* p. 111.

² *Warren Hastings in Bengal:* M. Jones. Ch. IV.

³ M. Ruthnaswamy. *"British Administrative System in India,"* p. 117.

⁴ *Ibid.*, p. 119.

connected with the functions of sovereignty, for nothing can warrant the Servants of the Company to commit any act inconsistent with the obligations of a just and true *Sovereign* power towards its subjects.”¹

The year 1813 marks the dividing line between the earlier theory of the relation of allies to each other and the later theory and practice of the relationship of paramount power and subordinate states.² The Residents or Political Agents had been called upon to mediate between the princes and their feudatories as in Mewar and Jodhpur in 1832, between Gwalior and Gohad, between Baroda and Kathiawar Chiefs. No wonder, ‘Intelligence Work’ was one of the main tasks of the officer accredited to native Courts or Camps. The situation of Native Raja’s armies and the course of their intrigues at their Courts had to be reported on.³ Malcolm was during the war of 1805-06 Governor-General’s Agent as well as the Brigadier-General with the forces. Charles Metcalfe was at once the Secretary and Persian translator of the Military Commander and the representative of the Governor-General in the districts in which the British forces operated. As Prof. Ruthnaswamy put it “war and diplomacy were the twin spheres of activity of the early political.”⁴ Some political officers have

¹ Letter of Bengal Government to India Government, 19th July 1804 in Selection of Records of East India House, Judicial. Vol. IV.

² Letter from David Hill. 17 Jan. 1832—Appendix to Report from Select Committee of House of Commons. 1832.

³ *Letters and Life of Mountstuart Elphinstone* by Colebrooke. Vol. I., *Life and Correspondence of Charles Metcalfe*—by Kaye. Vol. I

⁴ Ruthnaswamy—‘*British Administrative System in India*,’ p. 486.

also administered directly the internal affairs of the state to which they were sent. Col. John Munro, Resident at Travancore, (1815-25) held the inconsistent posts of Resident and Dewan for more than three years.¹ During the minority of the Rulers of States or in times of regency, the Resident played an overshadowing part in the administration of the states.

The variety of the duties of political officers was immense. "The settlement of succession to the *gaddi*, the Government of the State during the minority or the infirmity or incapacity of a ruler, suppression of disorders in the state or of a mutiny of the State-troops, the settlement of land revenue in assigned districts as in the Berar of the Nizam's Dominions, the civilization of backward tribes, intelligence work with an army on the march on the frontier, in addition to diplomatic duties properly called, lent colour and even the spice of danger to a political officer's career."² In his picturesque way, the brilliant Pro-Consul, Lord Curzon described the political officer "at one moment grinding in the offices of the Foreign Department, at another the political officer may be required to stiffen the administration of a backward native state, at a third he may be presiding over a *Jirga* of unruly tribesmen on the frontier, at a fourth he may be demarcating boundaries amid the wilds of Tibet or the sands of Seistan."³

This political officer was an unique diplomatic

¹ Col. J. Munro's Evidence, 26th March 1832 in Minutes of Evidence on Affairs of East India Company 1832.

² Ruthnaswamy: *British Administrative System in India*, p. 492.

³ Lord Curzon's Speech at the United Service Club. Simla, 30th Sep. 1903. Collected Speeches. Vol. IV.

official. "The annals of international diplomacy elsewhere" do not acquaint one with such a diplomatic agent. "He was more and less than an ambassador."¹ He had the rights and duties of paramount Sovereignty and had powers of intervention and interference in the internal affairs of Indian States. But he has no plenipotentiary powers in any circumstances or contingency.² He is not the ambassador but the agent of the Government of India. Malcolm, an illustrious political official, was reminded of his status thus by Lord Wellesley while he was handling a diplomatic situation between Gwalior and Gohad, that his duty was "to obey my orders and to enforce my instructions. I will look after the *public* interests."³

The status of the East India Company in law may at this stage be examined. As Wheaton with his unrivalled knowledge of international law and diplomatic relations has stated, the East India Company could not be considered as a "State" in international law, "even whilst it exercised the sovereign powers of war and peace in that quarter of the globe without the direct control of the Crown and still less can it be so considered since it has been subjected to that control."⁴ These powers were exercised by the East India Company in subordination to the King in Parliament; the external sove-

¹ M. Ruthnaswamy. *British Administrative System in India*, pp. 494-495.

² Report of Select Committee on Affairs of East India Company 1832.

³ Life and Correspondence of Major-General Sir John Malcolm by J. W. Kaye, vol. I. p. 276.

⁴ Wheaton. *Elements of International Law*. IV. English Edition, p. 31.

reignty of which was represented by the Company "towards the native princes and people, whilst the British Government itself represented the Company towards other foreign sovereigns and states."¹ Except the observations of Romilly, M. R. in *Rajah of Coorg vs. The E. I. Company*² which have to be very properly considered as *obiter dicta*, in all other cases³ usually cited, the question of sovereignty of the Company was not expressly raised or decided: "it was merely held that the act in question was an Act of State." Sirdar D. K. Sen's observations on these cases are correct.⁴ As the eminent international lawyer has laid down:—"an incorporated company is the creature of the State to the law or to the government of which it owes its corporate existence and powers." Or again, "the Company, as a technical person having an existence in law, is a technical subject of the state which has called it from nothingness into that mode of being."⁵ When the company acquired territory "the territory and the international Sovereignty over it belong to the British Crown though they may be held mediately by the Company, as the Earls of Derby were at one time mediately Kings of the Isle of Man." This is implicit by parlia-

¹ Vide *The Secretary of State for India v. Kamachee Boye Sabeba* 1859. 13. Moore. P.C. 22.=7 M. I. A. 476.

² 29 Beav. 300.

³ *Nabob of the Carnatic vs. E. I. Coy.*

2. Ves. p. 56; *Gibson vs. E. I. Company* 5 B. N. C. 262. *Elphinstone vs. Badree Chand* 1 Knapp. P. C. 316, *Doss vs. Secretary of State*, 19 Eq. 509. *Frith vs. The Queen* L. R. 7 Eq. 365. *Rajah Saligram vs. S. of State*, 12. Beng. L. R. 167. *Reg. vs. Shaikh Boodin* (Perry's *Oriental Cases*)

⁴ Sirdar D. K. Sen. *The Indian States*, pp. 193-195.

⁵ Westlake. *Collected Papers*, pp. 195 and 196.

mentary interference with the Company from 1773 and was expressed in the subsequent periodical renewals of the Charter. The Act of 1793 confirmed the title of the Company to its territorial acquisitions "without prejudice to the claims of the public." The Act of 1813 declared that its provisions were without prejudice to the "undoubted Sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions." The Act of 1833 (Statute 3 and 4 William IV. Cap. LXXXV) declared the Company to be "trustees for the Crown of the United Kingdom" and by the Act of 1858 "the trusteeship was terminated and the Sovereignty of the State, which had never been doubtful to 'the discerning eye' was unveiled to every one."¹ § 67 of the Act of 1858 (Statute 21 and 22 Vic. Cap. CVI) enacted that "all treaties made by the said Company shall be binding on Her Majesty."

Many Indian States had maintained an independent existence for hundreds of years and some states including Travancore, Jammu, Orchha, and Hyderabad, and many of the Rajput and other states have never been conquered or annexed. At this stage, the status of representative States *at the time when treaties or Sanads were contracted* with them falls to be examined.

Travancore

A start from the Southern States is historically very instructive. *Travancore*, an ancient "friend and ally" of the East India Company, was never under Moghul

¹ Westlake. "*Collected Papers*", p. 197.

sway. In 1729, Maharaja Martanda Varma consolidated his dominions and attained a position of unique importance in Kerala. In 1753, Travancore had a treaty with the Dutch. In the Madura and Tinnevely Campaigns the Travancore State assisted the British in 1756. The successor of Maharaja Martanda Varma, Raja Vanji Bala Varma was a steadfast ally of the British in the Wars with Haidar Ali and Tippu Sultan. He was included in the Treaty of Mangalore (1784) between the East India Company and Tippu Sultan of Mysore. Art. I of the Treaty mentions the Maharaja of Travancore as a "friend and ally."

In 1788, when threatened by Tippu Sultan, the Raja entered into an Agreement with the Company under which two battalions of Sepoys were to be stationed on his frontier. In 1789, Tippu attacked the Raja, the Company's ally, and cruelly devastated the Travancore State. The Company declared war on Tippu. In the interpretative letter, deemed equal to a treaty, dated 7th July 1789, from Earl Cornwallis to the Nizam, it is found *inter alia* that the force engaged under Art VI of the Treaty of 1768, was not to be employed against any power in alliance with the Company as the Raja of Travancore.¹ Treaties were concluded between Travancore State and East India Company in 1795 and 1805 in which the Travancore Government sought the assistance of the British in protecting its frontiers and entered into certain stipulations therefor. Thus, "at no time was Travancore conquered and the treaties

¹ Aitchison. *Treaties, Engagements and Sanads*. V. Ed. Vol. IX. p. 42.

were on the basis of two Sovereign States contracting with each other, one of which no doubt was much more powerful than the other and obtained favourable terms.”¹

Cochin

The Rajah of Cochin is descended from the last of the ‘*Cheranam Perumals*.’ In the continued enmity between Cochin and the Zamorin of Calicut, the alliance with Portuguese was pursued by Cochin. A site was thus given to the Portuguese in 1503 to build a wooden fort. For more than a century, mutual friendship and goodwill continued between Cochin and the Portuguese. When the Portuguese favoured his enemies, the Raja of Cochin proceeded to Colombo and sought the aid of the Dutch. The Portuguese had to retire from Cochin in 1663 through the united attack of Vira Kerala Varma and the Dutch. Cochin had to surrender to Haidar Ali in 1776 and pay an annual tribute to Haidar. ‘Under Art. VI of the Treaty with the Raja of 1791, “in consideration of a Treaty which subsists between the Honourable Dutch East India Company and the Raja Rama Varmah of Cochin, the Honourable Governor-in-Council of Madras, not wishing to enter into any condition which may not be compatible with the spirit of the treaty subsisting between the above-mentioned parties it is agreed that Raja Rama Varmah shall become tributary to the Honourable East India Company only for those districts and places.....which were

¹ Reply of the Dewan of Travancore in his Address in Travancore Legislative Assembly dated 5th August, 1940.

in the possession of Tippoo Sultan and for which the said Raja paid him tribute and with which the Honourable Dutch Company have no concern." In 1809 an insurrection took place in Cochin against the British power and after its suppression a fresh treaty of "perpetual friendship" was concluded in 1809, by which the Raja agreed to pay an annual sum in addition to the previous subsidy. The other provisions are in essential parts reproductions *verbatim* of clauses which are found in the Treaty with Travancore of 1805.

Hyderabad

Kamaruddin Asaf Jah, a distinguished soldier of Aurangzeb was appointed Nizam-ul-mulk and Subahdar of the Deccan; but he eventually threw off the control of Delhi Court. In the condition of India of XVIII century, it is necessary to restate that except Bombay which was acquired by England in full Sovereignty—by *cession* from Portugal as a part of the dower of Catherine of Braganza—the East India Company's position was analogous to that of the states under the Holy Roman Empire between 1648 (Treaty of Westphalia) and 1806. The Moghul Empire had fallen "into decrepitude"; and its provincial Subahdars, as the Nizam of the Deccan and the Nawab Wazir of Oudh asserted "a practical independence similar to that of the German States, but again similarly without wholly ignoring the nominal Sovereign of India."¹ The East India Company treated those rulers as internationally Sovereign and made alliances, wars and peace with

¹ Westlake. *Collected Papers*, p. 198.

them, just as England and France acted with regard to the Elector of Brandenburg or of Bavaria. Like the Nizam, it bowed in compliment only, to Moghul supremacy; and 'bags of gold' were offered to the Great Moghul till the cold season of 1842-43, when it was prohibited by Lord Ellenborough. The Company went through the form of acceptance of a "paper title" to confirm what had been acquired by cession or conquest from the real predecessor—as e.g., confirmation from the Emperor at Delhi of grants of certain districts which they had already received "from the Nizam of the Decan and the Nawab of the Carnatic," and the obtaining of grant of the *Dewanee* of Bengal, Behar and Orissa of which "it was already in secure possession through the victory of Buxar."¹

The Nizam's status was akin to that of the Elector of Brandenburg or Bavaria. Through the Treaty of 1759, the Nizam granted the seaport of Masulipatam and other districts to the English. Again the Treaty of 1766 was "a treaty of perpetual honour, favour, alliance, and attachment between the Great Nawab and the Honourable East India Company." By the treaty "in return for the Circars of Ellore, Chicacole, Rajamahendri, Mustafanagar, and Murtuzanagar," the British Government agreed to furnish the Nizam with a subsidiary force when required and to pay nine lakhs a year when the assistance of their troops was not required. The Nizam on his part engaged to assist the British with his troops. Art. XI of this treaty is important in that the "diamond mines" with the villages appertaining

¹ Ibid. p. 199.

thereto, shall "remain in (the Nizam's) possession now also," after the grant of the villages to the Company.

On the outbreak of the war with Tippu, a treaty of Offensive and Defensive Alliance was concluded on fourth July 1790 between three allies, the Nizam, United East India Company and the Peshwa. Art. VI of the Treaty contemplated an equal division of territory after victory against Tippu.

The Nizam applied to the British Government for aid against the Mahrattas, but Sir John Shore was precluded from interposing further than as mediator. Through resentment at this refusal, the Nizam entertained a body of troops commanded by French officers.

The diplomacy pursued by the East India Company fructified in the enlarged Perpetual Subsidiary Treaty of 1798. During the early Company days, the powers of the land required the military help of the Company. This military help was given on condition of regular payment of money. When the Country powers defaulted, they had to accept control and supervision of their government by officers of the Company stationed at their Courts. "Still further security was furnished by the permanent stationing of Company's military forces in the territory of the states to guard them against internal disturbance or to defend them against neighbours. Thus the theory of the Subsidiary System was built up. Another condition of the alliance was that the states should have no international dealing with foreign states or with other states in India save with the consent of the British Government.....the facts of the international situation and of the internal situation in each of the states gave the British the oppor-

tunity, the reason, the hints which allowed them to build up the theory of those relations between them and the states.”¹ A study of Mahratta history reveals that one state being in the *Shikum* of another was a common phenomenon as Gaekwar was for a time in the *Shikum* of the Peshwa.² There is found a repudiation of the theory that the control exercised by the British might be derived from the prerogative of the Moghul Emperors in one of the despatches of Wellesley. In describing these arrangements on June 2, 1805, Lord Wellesley wrote “it has never been in the contemplation of this government to derive from the charge of protecting and supporting His Majesty the privilege of employing his royal prerogative as an instrument of establishing any control or ascendancy over the states and Chieftains of India or of asserting on the part of His Majesty any of the claims which in his capacity of Emperor of Hindustan His Majesty may be considered to possess upon the provinces originally composing the Moghul Empire.”³

The treaty of 1798 with the Nizam, was one of the earliest of its kind; and Art. V stipulates that “the said subsidiary force will at all times be ready to execute services of importance such as the protection of the person of His Highness, his heirs and successors, and overawing and chastising all rebels or excitors of disturbance in the dominions of this state; but it is not to be employed on trifling occasions, nor like *Sebundy*

¹ Ruthnaswamy. *British Administrative System in India*, pp. 604 and 605.

² *Life of Mountstuart Elphinstone*. Colebrooke. Vol. I.

³ *Letter of Governor-General to Select Committee*. June 2, 1805. Wellesley's Despatches, Vol. IV.

to be stationed in the country to collect the revenues thereof." Under Art. VI of the same treaty "immediately upon the arrival of the subsidiary force at Hyderabad, the whole of the officers and servants of the French party are to be dismissed, and the troops comprising it dispersed and disorganized, that no trace of the former establishment shall remain."

As a result of the deteriorated internal conditions of Hyderabad, more than once was an attempt made to solicit the services of the subsidiary force for purpose of quelling purely internal disorder and enforcing revenue collections. It was thus reiterated in the Treaty with the Nizam dated 21st May 1853. Art. 2 of the Treaty stated *inter alia* that "the.....subsidiary force shall be employed when required to execute services of importance such as protecting the persons of His Highness, his heirs and successors and reducing to obedience all rebels and excitors of disturbances in His Highness Dominions; but it is not to be employed on trifling occasions or like *sebandy*, to be stationed in the country to collect revenue."

Mysore

By 1399, two brothers Vijaya Raj and Krishna Raj came to Mysore and established a rule there. After the death of Dodda Krishnaraja in 1731, the direct descent failed and real power descended to the hereditary general of the forces. Hyder Ali who commanded a force sent by the Maharaja of Mysore to Trichinopoly, deposed the Hindu King, Chikka Krishna Raja Wodayar through resort to intrigue and force. The Bombay Government concluded a commercial treaty with Hyder Ali in 1763.

When Hyder Ali was within five miles of Madras raising fire and looting, the Company was obliged to conclude a treaty with him in 1769 on a footing of mutual restitution of conquests and a defensive alliance. The treaty of Mangalore of 1784 and the treaty of peace with Tippu Sultan of 1792 could not avoid a collision with Tippu. After the fall of Seringapatam (1799) and death of Tippu valiantly fighting therein, the family of Tippu was set aside and the ancient Hindu Dynasty was restored in Mysore under Krishna Raja Wadiyar. This grant of territories to the Maharaja was made solely by virtue of the powers of the British Government acquired through *Conquest*.

The subsidiary treaty with the Raja of Mysore of 1799 stresses the absolute dependence of the Mysore State on British Government in matters external (Art. VI) and Art. XIV of the Treaty stressing the "promise" of the Ruler "to pay at all times the utmost attention to such advice as the Company's Government shall occasionally judge it necessary to offer to him" in all branches of internal administration emerges for the first time in the Mysore treaty of 1799, later on to be reproduced *verbatim* in the Travancore treaty of 1805, and the Cochin Treaty of 1809. After the Mysore disorders of 1830, a British force was sent to quell the insurrection and administration was entrusted to British officers on October 19th 1831 and Mysore had the continued advantage of British rule for fifty years till 25th March 1881. Through an Instrument of Transfer in 1881, the Maharaja was "placed in possession of the territories of Mysoreand installed in the administration thereof" (Clause I). The omnivorous authorization article of

internal interference (Article XIV of 1799) is repeated in clause XXII of the Instrument of Transfer, 1881.

The Instrument of Transfer of 1881 has been replaced by the Treaty of 26th November 1913 with the sanction of His Majesty's Government, thereby placing the relations of the British Government with the Ruler of Mysore on a footing more in consonance with his actual position among the Chiefs of India. In the place of the all-pervasive clause XXII of the Instrument of Transfer 1881, Art. XIX of the Treaty of 1913 states that "no material change in the system of administration now in force shall be made without the consent of the Governor-General-in-Council." Art XXI of the same treaty disclaims any "desire to interfere with the freedom of the Maharaja of Mysore in the internal administration of his State in matters not expressly provided for herein." Art. XVIII of the Treaty dealing with Laws and Regulations of 1881 and their preservation was abrogated in December, 1933.

The Peshwa

Prof. Westlake would find from international law "the apparition of merely insurgent powers"¹ to describe the Maharatta domination in India. The *de facto* Sovereign power exercised by the Peshwa was sufficient to induce the East India Company to conclude many treaties with "*Peishwa Rao Pundit Purdhan*." There remained only the titular Sovereignty of Muhammad Shah when the able minister Balaji Vishwanath recovered for Sahuji, the grandson of the Great Shivaji Maha-

¹ Westlake, *Collected, Papers*. p. 198.

rajah Chhatrapathi, his rights. Sahuji's successors became titular Rajas at Satara "while the real authority and actual supremacy in the Maharatta Confederacy devolved upon Balaji, in whose family the office of Peshwa became hereditary."¹

After Balaji's death in 1720, Baji Rao, his son, held office for twenty years. Baji Rao was created Subadar by the Emperor of Delhi. The East India Company concluded with him a commercial treaty in 1739. Under Art. VI of this treaty, "all the merchant's vessels and fishing gallivats belonging to Baji Rao's government shall have free passage through the said river" (River Mahim). Baji Rao died in 1740.

The Company entered into an agreement with Bala-
jee Baji Rao for an expedition against Toolajee Angria in 1755. After the defeat of Angria, another treaty was made with the Peshwa in 1756. At the time of Baji Rao, the Chiefs Scindhia and Holkar had risen to be "the principal leaders of the Mahratta armies under Raghoba." After the disaster of Panipat (1761) at the hands of Ahmad Shah Abdali, the Peshwa could survive only for a short time. By 1771, the influence of the Maharattas was re-established "in upper India by Scindhia who overran Rohilkhand, detached the Emperor Shah Alam from alliance with the British and replaced him on the throne of Delhi where he held him in a state of tutelage."²

The Treaty of Purandhar ('Poorundur') of 1776, the enforced Convention of Wargaon, (1779) the Treaty

¹ Aitchison. V. Ed. Vol. VII. p. 2.

² Aitchison. V. Ed. Vol. VII. p. 3

of Salbai (1782) leading to restoration of peace with Peshwa, the supplementary treaty of 26th April 1783 elucidating the maritime intercourse clause of the Treaty of Salbai (Art. XI), the ill-fated Treaty of Seringapatam (1790) which only increased the jealousy of the Maharatta powers against the ascendancy of the British Government, the crisis in the affairs of the Peshwa after his severe defeat at the hands of the Holkar in 1802 leading to the Treaty of Bassein (1802) between the British Government and the Peshwa, and the Partition Treaty of Poona (1804) distributing the conquered territories from Scindia and Raja of Berar between the British Government, the Peshwa and the Nizam, left the Peshwa an insignificant shadow of his former reflected glory. The later story in the declining period of the Peshwa was marked by Baji Rao's suspicious conduct against Gangadhar Shastri, the minister of the Gaekwar; the eventual surrender of Baji Rao's strong forts, and Baji Rao's cunning and cowardly plunder of the Residency at Poona on 5th November 1817 and his well-deserved reduction and *resignation of Sovereignty* in 1818 with the graceful grant of a princely allowance of Rs. 8,00,000 to enable him to live in peace at some place on the Ganges.¹

Kolhapur

The rulers of Kolhapur have been descended from the representatives of the younger branch of the family of Shivaji Maharaja, the great founder of the Mahratta

¹ Vide *Propositions to Baji Rao* dated 1st June 1818. Aitchison. IV. Ed. Vol. VI. p. 73.

Empire. The Kolhapur family was compelled to yield precedence to Sahuji who by the Partition Treaty of Satara (26th April 1731) recognized Kolhapur as a distinct and independent principality. A commercial treaty with Kolhapur was concluded in January 1766. In 1792 there was an Agreement with the Raja of Kolhapur for payment of compensation for losses sustained by merchants at Malwan (Art. IV of Agreement dated 24th December 1792). As a security for the payments before-mentioned, the Rajah of Kolhapur agreed to the establishment of a factory at the island of Malwan and "if required at Kolhapur." (Art. V). A Treaty was concluded between the Rajah of Kolhapur and the British Government on 1st October 1812 whereunder *inter alia* "in consideration of the cession of the harbour of Malwan and on condition of the effectual suppression of piracy, the Honourable Company engaged to guarantee such territories as shall remain in the Rajah of Kolhapur's possession against the aggression of all foreign Powers and States." (Art. VIII). To remove some misunderstandings, further articles of agreement had to be concluded in 1826. Since the Raja had committed "several acts in direct violation of the treaty of 1826" preliminary articles of agreement providing for "conditions of a new nature" were signed on 23rd October 1827 and final articles modifying certain parts of the preliminary treaty were concluded on 15th March 1829. Under Art. VIII, "the British Government deeming it necessary to appoint a Chief Minister for the future management of the Raja's Government, His Highness.....engaged to be guided by his advice in all matters relating to the administration of his state,

the British Government having the sole power of appointing or removing the said minister as they may see fit."

The administration of Kolhapur was transferred to the Raja in 1862 when the Raja had attained "full age and evinced loyalty to the Government of Her Majesty the Queen,"¹ with reservations as to internal management as were "contained in an agreement signed by the Raja" on 20th October 1862. During the time of H. H. Sir Sahu Chatrapatti the restraint in Art. VII of the Agreement of 1862 requiring reference in cases of death sentence was removed; the Residency jurisdiction exercised in Criminal Cases in the nine Feudatory Jagirs was restored to the Kolhapur Durbar in May 1930.

Baroda

One Khande Rao Dabhade maintained his followers in Gujerat and Kathiawar from which he exacted tribute. He supported Sahuji and was raised to the rank of *Senapati*. He died in 1721. Damaji Gaekwar was appointed second in command by Khande Rao. As he also passed away in 1721 they were succeeded respectively by Trimbak Rao Dabhare (the son of Khande Rao) and Pilaji Rao Gaekwar (nephew of Damaji Gaekwar). In 1729, Baji Rao Peshwa obtained from the Moghul deputy in Gujerat a cession of the *Chauth* (one fourth part) and other duties of Gujerat. Trimbak Rao who opposed Baji Rao was slain in battle in 1731. Pilaji Rao Gaekwar who got the title of *Sena Khas Kbel* (Commander

¹ Preamble to Articles of Revised Agreement. 20th October 1862.

of the household troops) was murdered by one of the messengers of the Raja Abhai Singh of Jodhpur, the Moghul deputy for Gujerat. Though it cannot be "ascertained exactly when the Gaikwads became formally principals instead of *mutaliks* or deputies, they were virtually so from this time."¹(a) The Peshwa appointed Yeshwant Rao, the little infant of Trimbak Rao Dabhare as Senapati. Meantime the cession of Chauth of Gujerat to Peishwa was disallowed by the Emperor of Delhi. Yeshwant Rao proved very incompetent.

Damaji Gaekwar wrested Gujerat from the Moghuls and the Dabhare family had to give way to the supremacy of the Gaekwars. Treacherously seizing Damaji Gaekwar, the Peshwa wrested a partition of Damaji Gaekwar's conquests in Kathiawar. The Moghul Government at Ahmedabad was subverted through efforts of the Peshwa and the Gaekwar and the country was divided between the Gaekwar and the Peshwa. Damaji Gaekwar died in 1768 and left behind four sons. The first Sayaji was pronounced to be an idiot fit only to be used as a tool by Fateh Singh, his youngest brother.

The Articles of Agreement between the Peshwa—who wanted to exploit the dissensions between the Gaekwar brothers—and Sayaji Rao (1772-73) in the form of a memorandum with Peshwa's answer for each serve as a forerunner of the many treaties of protection and *Sanads* to be concluded by the East India Company in future. In Art. II Sayaji Rao writes: "If I should be

¹ *The Gaikwads of Baroda*. Vol. I. by Gense. and Banerji, p. XI.

molested by any foreign foe, you are to send me assistance and protect me.” In Art. XVIII Sayaji Rao wants the assurance:—“You are not to attend to my relations, servants, or agents who may bring forward complaints against me but to make over my own (people) to me.” In Art. XXV by the Peshwa, Sayaji Rao was “every year to serve at the presence with 3000 horse and 4000 in time of war. One person of the Gaekwar family was to remain in winter quarter with the troops if it is necessary.”¹

On 12th January 1773, Futteh Singh Gaekwar entered into an agreement with the British Government by which Broach which was conquered by the “Honourable Company” was to remain on the footing prior to its assault by British Government in 1772. In 1778, Fateh Singh Gaekwar was recognized as *Sena Khas Khel*. After the humiliating Convention of Wargaon in 1779, a treaty of offensive and defensive alliance was concluded on 26th January 1780 by the British Government with Fateh Singh Rao Gaekwar, acknowledging the independence of the Gaekwar from the Peshwa. An intriguing point of interest to the international lawyer has emerged with regard to this treaty. The terms of the treaty as originally concluded and exchanged with Fateh Singh were generally approved by the Supreme Government; but some objections were taken to the wording of it. The seal of Government and the signature of members of the Council were affixed by way of ratification to an amended version, copies of which were sent to the Bombay Government to be ex-

¹ Aitchison. IV. Ed. Vol. VIII. Appendix IV. Baroda.

changed with Fateh Singh Gaekwar. These alterations were never communicated to him. Under the normal rules of treaty-making, neither version of the treaty could be taken to be a binding document.”¹ After the Treaty of Salbai (1782) the territory of the Gaekwar was placed as prior to the war and Fateh Singh was to pay tribute to Peishwa as before. Fateh Singh died on 21st December, 1789 and his elder brother Manaji was recognized by Peshwa. After his death in August 1793, Govinda Rao, the second son of Damaji Gaekwar, succeeded to the Gaekwad. Govinda Rao got recognition from Peshwa as *Sena Khas Khel* and died in September, 1800. Govinda Rao was succeeded by his son Ananda Rao, one endowed with a weak intellect. For a time, his illegitimate half-brother Kanhoji Rao usurped the Gaekwad but he was deposed by Raoji Appaji, a capable and shrewd minister who sided Ananda Rao. Through the good offices of this minister Raoji Appaji, who had served Govinda Rao also, articles of Agreement were concluded between Anand Rao Gaekwar, “*Sena Khas Khel Shamsber Bahadur*” and the British Government on 6th June, 1802. Under Art. V of this memorable agreement “there shall be a true friendship and good understanding between the Hon’ble East India Co. and the State of Anand Rao Gaekwar, in pursuance of which the Company will grant the said Chief its countenance and protection in all his public concerns, according to justice and as may appear to be for the good of the country, respecting which he is also to listen to advice.” Under Art. VI “for the cultivation and promoting the

¹ Aitchison. V. Ed. Vol. VI. p. 285.

permanency of the good understanding between the two states, there shall be a constant good correspondence kept up between them and agents reciprocally appointed to reside with each." In the ratifying letter dated 29th July, 1802 of Anand Rao Gaekwar it is thus concluded:—

"In the last place, I desire to form the most intimate connection with the Company and that all business with the Poona Darbar may be jointly managed by the English Resident and my Vakeel."¹

By the XIV Art. of the Treaty of Bassein (31-12-1802) the treaty with the Gaekwar was "formally acknowledged."

A consolidating and definitive treaty of general defensive alliance was concluded between the British Government and Anand Rao Gaekwar in 1805. The well-trying rule of uses of the Subsidiary force is repeated in Art. I of the Treaty:—"The Subsidiary force will at all times be ready to execute services of importance such as the protection of the person of Anund Rao Gaekwar.....his heirs and successors, the overawing and chastisement of rebels and excitors of disturbance in his territories and the due correction of his subjects or dependants who may withhold the payment of the Sircar's just claims, but it is not to be employed on trifling occasions, nor like *Sebundee* to be stationed in the country to collect the revenue."

Under the supplementary treaty with the Gaekwar (1817), "the province of Okamundel and the island of Bate" is given by the Honourable East India Company to Maharaja Anund Rao Gaekwar, "his heirs or succes-

¹ Aitchison. IV. Ed. Vol. VIII, p. 39.

sors in perpetuity, with all the rights of sovereignty thereof and all the forts they contain.”

On these well-established facts, except with reference to the province of Okamandel and the island of Bate wherein sovereignty was obtained through the grant of the East India Company, the Gaekwar was *de jure* sovereign in his territory through conquest and functioning as the “farmer” of revenue of territories under the Suzerainty of the Peshwa. Though in the arrangements of 1807, the Gaekwar’s title to the greater part of the Kathiawar tribute was in his legal capacity of farmer for the Peshwa, yet the engagements concluded were drawn up solely in the Gaekwar’s name. “The Peshwa’s consent to the settlement was never asked nor was he even informed of what had been done till 1814 after the Gaekwar’s lease had expired and the disputes arose between the Peshwa and the Gaekwar which ended in the murder of Gangadhar Shastri. The British Resident at Poona then delivered a draft agreement to the Peshwa explaining the nature of the engagements which had been made and requiring him to respect them.”¹

Gwalior

Ranuji, the founder of the Scindia family, had acquired some possessions in Malwa. From a command in the *Paigah* or bodyguard of the Peshwa he rose to the front rank of Mahratta Chiefs. He died in 1750. His son Jayapa was killed in 1759. Jayapa was succeeded by his son Jankiji who lost his life after having been taken prisoner at Panipat (1761). His uncle Mahdoji Scindia

¹ Aitchison, V. Ed., Vol. VI, pp. 6 and 7.

succeeded to the Chiefship. Though 'nominally the servant of the Peshwa' he became the virtual ruler of Hindustan. After the British Government under Colonel Muir defeated Mahdoji Scindia in 1781, Mahdoji was persuaded to mediate between the British Government and the Mahrattas. By this treaty of 13th October 1781 the forces of Scindia and Colonel Muir had to be withdrawn to their respective countries (Art. II). The Treaty of Salbai (1782) was concluded and Scindia guaranteed its observance. In effect, this treaty recognized Scindia's independence. What with the system of neutrality then pursued by the British, it was possible for Scindia with his formidable army commanded by French officers to overlord Northern India and get 'control over' the person of the Emperor of Delhi. Mahdoji the mighty Scindia, died in 1794. He was succeeded by his grand nephew Daulat Rao Scindia. The British Government which had recovered its influence at Poona after the Treaty of Bassein (1802) made overtures for an amicable settlement of their differences. War had to be declared against Scindia and his power was broken. Daulat Rao Scindia had to sign the Treaty of Serji Anjangaon in 1803. Art. XIV of this treaty provided that "in order to secure and improve the relations of amity and peace established between the Governments, it is agreed that accredited ministers from each shall reside at the Court of the other."

Art. IX of the Treaty of Sarji Anjangaon read thus: "Certain Treaties have been made by the British Government with Rajahs and others, heretofore feudatories of the Maharaja Ali Jah Dowlut Rao Scindia. These treaties are to be confirmed and the Maharajah

hereby renounces all claim upon the persons with whom such Treaties have been made and declares them to be independent of his Government and authority, provided that none of the territories belonging to the Maharajah, situated to the southward of those of the Rajahs of Jeypore and Jodhpore, and the Rana of Gohad, of which the revenues have been collected by him or his Amildars, or have been applicable as *Surinjamee* to the payment of his troops, are granted away by such territories. Lists of persons with whom such treaties have been made will be given to the Maharajah Dowlut Rao Scindia, when this treaty will be ratified by His Excellency the Governor-General." While the text of this clause ran thus, this article was construed to include surrender of the fortress of Gwalior and the *pargana* of Gohad. In the history of the transactions of the East India Company with the Scindia it is painful to record how such an erroneous interpretation was put on the article whose normal interpretation excludes both. At this distance of time, it is redeeming to record that General Wellesley (and Colonel Malcolm) declared that "Scindia had signed the treaty on the distinct understanding that Art. IX did not apply to the fortress of Gwalior and the *pargana* of Gohad."

Scindia was gravely upset and he attacked the Residency. Thanks to the arrival of Lord Cornwallis, negotiations started on the basis of restoring 'Gwalior and Gohud.' The Treaty of 1805 was intended to do away with doubts and misunderstandings which had arisen "respecting the clear meaning and interpretation of parts of the Treaty of Anjangaon." Under Art. II of the Treaty, it was agreed to "cede to the Maharaja

that fortress (Gwalior) and such parts of the territory of Gohud etc.” Art. VIII dealt with the engagement of the Honourable Company “to enter into no treaty with the Rajahs of Oudeypore and Jodhpur and Kotah and other chiefs, tributaries of Daulat Rao Scindia, situated in Malwa, Meywar or Marwar, and in no shape whatever to interfere with the settlement which Scindia made with those chiefs.”

The Treaty of 1817 was actuated by a desire to suppress the Pindarees, and Art. IX of the treaty abrogates and annuls Art. VIII of the Treaty of 1805. “The main object of the contracting parties being to prevent for ever the revival of the predatory system in any form, and both Governments being satisfied that to accomplish this wise and just end, it may be necessary for the British Government to form engagements of friendship and alliance with the several states of Hindostan, the eighth Article of the Treaty of 22nd November 1805, by which the British Government is restrained from entering into treaties with certain chiefs therein specified, is hereby abrogated; and it is declared that the British Government shall be at full liberty to form engagements with the states of Oudeypore, Jodhpur, and Kotah and with the state of Boondée and other substantive states on the left bank of the Chumbul. Nothing in this article shall, however, be construed to give the British Government a right to interfere with States or Chiefs in Malwa or Gujerat, clearly and indisputably dependent on or tributary to the Maharaja and it is agreed that His Highness’ authority over those states or chiefs shall continue on the same footing as it has been heretofore. The British Government agrees

and promises in the event of its forming any engagements with the above-mentioned states of Oudeypore, Jodhpur, Kotah and Boondee, or with any others on the left bank of the Chumbul, to secure to Daulut Rao Scindia his ascertained tribute and to guarantee the same in perpetuity to be paid through the British Government; and Daulat Rao Scindia engages on his part, on no account or pretence whatever, to interfere in any shape in the affairs of these states without the concurrence of the British Government.” (Art. IX)

The relationship of Suzerainty of Scindia over his Jagirdars and Tankadars got clarified in 1921 when H. E. the Viceroy addressed them. The Viceroy adverted to the pacification of the country from the Pindaree freebooters by Sir J. Malcolm. The settlement of Malwa involved the guarantee on the part of the British Government that “whatever was settled would be scrupulously observed.” But, continued the Viceroy, “the British Government did not intend that the mediation of Sir J. Malcolm should form the basis for encroachment upon or interference with the Suzerain rights of the Darbar.”¹ It was thus arranged that the Gwalior Durbar will issue to the Jagirdars fresh *Sanads* in perpetuity in a form approved by the Government of India. The Gwalior Darbar subsequently granted new perpetual *sanads* to forty-three holders.

The East India Company entered into a treaty of alliance and mutual defence with another power in the form of the Scindia who since the Treaty of Salbai (1782)

¹ H. E. Viceroy’s Speech at Gwalior addressed to Jagirdars and Tankadars on 14th March 1921.

had a separate sovereign entity in law. In 1803, "*accredited ministers from each Government*" were to reside at the "Court of the other."¹

Indore

The House of Holkar was founded by Mulhar Rao. His prowess as a soldier brought him into prominence under the Peshwa. After the battle of Panipat (1761) Mulhar Rao had extended his territories stretching from the Deccan to the Ganges. His son, Khande Rao had been killed in 1754; and Mulhar Rao Holkar who died in 1766 was succeeded by his grandson Mali Rao who too unhappily died insane after nine months. Mali Rao's mother, the famous Ahalya Bai of Indore succeeded to the state. She appointed as Commander one Tukoji Rao belonging to the same family; Tukoji Rao served loyally the great Queen. Ahalya Bai died in 1795; and Tukoji passed away in 1797.

Tukoji Rao left four sons. His son, Mulhar Rao was slain in 1798; in the distressing dissensions of the family, Yeshwant Rao, an illegitimate son of Tukoji Rao, restored the reputation of the Holkar's State by defeating Scindia and Peshwa in 1802 near Poona. Yeshwant Rao stood out of the combination of Scindia and Raja of Berar against the British; and fatal disunion which had marked the Mahratta Confederacy at the close of the eighteenth century resulted in the separate alliances of the East India Company with Scindia in 1803 followed by the Treaty of 1805 on the Beas after the epoch-making success of Lord Lake.

¹ Art. XIV, Treaty of Serji Anjangaon.

It is necessary to record here that no copy of this Treaty of 24th December 1805 "is forthcoming from the Darbar's records;" nor has the counterpart which Sir John Malcolm engaged to deliver duly ratified within one month been found. A copy of a document in Persian dated four days later and a Hindi copy of the same bearing the Maharaja's seal have also been discovered.¹ Holkar had to surrender a large portion of his territories. Yeshwant Rao died in 1811. He was succeeded by his minor son Mulhar Rao during whose period a favourite concubine of Yeshwant Rao, Tulsi Bai, dominated in the regency. Factions rose and a powerful military faction of Pathan chiefs murdered the regent and precipitated another war with the British. The Holkar was defeated at Mahidpur in 1817 and the Treaty of Mandasor was concluded on 6th January, 1818. Under Art. II "Maharaja Mulhar Rao Holkar".....agreed to renounce all "claims whatever to the territories guaranteed in the.....Engagement by the British Government to the Nawab Ameer Khan and his heirs....." Under Art. IV the Maharaja agreed "to cede to the British Government all claims of tribute and revenue of every description which he has or may have had upon the Rajput princes, such as the Rajahs of Oudepoor, (Udaipur) Jeypore, Jaudpore (Jodhpur), Kotah, Bhoondie, Karawalie, etc." Under Art. XIV, "in order to maintain and improve the relations of amity and peace established it is agreed that an accredited minister from the British Government shall reside with the Maharaja Mulhar Raw

¹ Translation of treaty is printed in Appendix VII, Aitchison IV Ed. Vol., IV.

Holkar and that the latter shall be at liberty to send a Vakeel to the Most Noble the Governor-General." Under Art. XVI, the "English Government engages that it will never permit the Peishwah (Sree Munt) nor any of his Heirs and Descendants to claim or exercise any Sovereign rights or power whatever over the Maharajah Mulhar Raw Holkar, his heirs and descendants."

Rising in his stature from a soldier of fortune to that of the *de facto and de jure* sovereign of territories *conquered*—stretching from the Deccan to the Ganges at a time—the Holkar had a status in law sufficient to exact tributes from Udaipur, Jaipur, Jodhpur, Kotah, Boondie and Karauli among other chiefships. The Treaty of Mandasor (1818) which defines to this day "the relations of the State with the British Government" has all the marks of a solemn engagement between allies where the British Government guarantees "absolute" internal autonomy (Art. X) and 'binds itself' to maintain the "internal tranquillity of the territories of Mulhar Rao Holkar and to defend them from foreign enemies" (Art. VII).

Change in the Character of British Relationship

No alleged right of self-preservation against the contagion of revolution from international law can be imported into the chaotic conditions of India of the latter half of eighteenth century and the beginning of nineteenth century. England "could not be long in perceiving that the internal anarchy of the states beyond her borders was one of the chief causes which had compelled her to advance, and that unless it was checked, it would conti-

nue to compel her to advance.”¹ In this view, Lord Cornwallis’ policy of non-interference has proved to be a fond hope of a great gentleman not capable of checking the enveloping chaos.

Thus the forty years from 1818-1858 witness the growth and establishment of the imperial idea. It is a profound historical statement which Prof. Westlake made when he laid down that Indian States “have lost the character of independence, not through any epoch-making declaration of British Sovereignty, but by a gradual change in the policy pursued towards them by the British Government. Encountering the ambition of some of its neighbours and the internal anarchy of others and the efforts of France or French adventurers to build on these elements a power rivalling its own, the Government was early led to see that its own security, even within the limits which it had from time to time attained, was to make for itself among the states of India such a preponderant position as Charles V, Louis XIV and Napoleon had essayed or were essaying with less justification to make for themselves among the States of Europe.”²

Dhar

This State belongs to the Puar family. Anand Rao Puar is widely believed to be the founder of the principality. Peshwa Baji Rao (1725-30) assigned to him the right to receive tribute from certain Rajput Chiefs. Anand Rao died in 1749; and his son Jaswant Rao Puar

¹ Westlake. “*Collected Papers*,” p. 203.

² Do., Do. p. 205.

was killed at Panipat (1761). Khande Rao Puar succeeded to him and he in turn left behind the state to his son Ananda Rao Puar. He died in 1807 and was succeeded posthumously by his son Ramchandra Rao Puar, whose mother, the talented Maina Bai, saved the principality from the excursions of Scindia and Holkar. By the Treaty of Protection of 16th January 1819, Dhar was taken into protection; and its tributary rights over Banswara and Dungarpur were ceded to British Government (Art. V). Under Art. II of the Treaty, Ramachandra Rao Puar, the Raja of Dhar agreed to "act in subordinate co-operation with the British Government, and to have no intercourse or alliance, private or public, with any other state, but secretly and openly to be the friend and ally of the British Government and at all times when that Government shall require, the Rajah of Dhar shall furnish troops (infantry and horse) in proportion to his ability."

The Dhar State rebelled in 1857 and was in consequence confiscated. It was subsequently restored to Raja Anand Rao Puar with the exception of the Bairsia Purgana which was made over to Bhopal as a reward for services during the Mutiny.

Bhopal

The ruling family was founded by Dost Muhammad, an Afghan. He obtained a lease of the Beragia Pargana in Malwa in Bahadur Shah's reign. In the unsettled times after the Emperor's death, he asserted his independent authority in Bhopal. He died about 1740 A. D. His legitimate minor son was forced to abdicate in favour of Yar Muhammad, an elder but illegitimate son, whose

“cause was espoused by the Nizam.” Peshwa Baji Rao’s demand in the name of the Emperor compelled the Nawab to “relinquish all his possessions in Malwa except a few towns”. Towards the close of the eighteenth century, the Bhopal territories were overrun by the Pindarees and Raghoji Bhonsla. The timely return of Wazir Muhammad, son of the Nawab’s cousin Sherif Muhammad Khan, saved his country from *extinction* and he became “the founder of the branch of the Bhopal family which has since ruled in the state.” Wazir Muhammad after brilliantly defending Bhopal in a siege of eight months by Scindia and Bhonsla in 1813, died in 1816.

At the time of the Pindari war in 1817, the British alliance with Nazar Muhammad, a son of Wazir Muhammad fructified into the Treaty of 26th February, 1818. Art. III of the Treaty contains the clause which in Lord Hastings’ time became very common *viz.*, to “act in subordinate co-operation with the British Government and acknowledge its supremacy” and not to have “any connection with other chiefs and states.” Under Art. IX “the Nawab and his heirs and successors shall remain absolute rulers of their country and the jurisdiction of the British Government shall not in any manner be introduced into that principality.”

Bhopal’s status in 1817 was that of a sovereign country *de jure* and *de facto*. The British Government rewarded the fidelity of the Nawab in the fight against Pindarees by a “Grant to the Nawab, his heirs and successors in perpetuity the five Mahals of Ashta, Jehawar, Sehore, Dooraha and Devapoorā to be held by them in exclusive authority.” (Art. X).

Orchha

This is the only state in Bundelkhand which was not held in subjection by the Peshwa. Rudra Pratap was the founder of Orchha (1501). The fourth in succession was Bir Singh Deo, considered the most illustrious of her Kings. His son, Jujhar Singh (1626-1635) was dispossessed of his kingdom and the state remained without a chief from 1635-1641. Shah Jehan restored it to Pahar Singh, another son of Bir Singh Deo.

Sawant Singh in the line of rulers after Pahar Singh reigned from 1762-1765 when Shah Alam gave him "a royal banner and the title of Mahendra". Eleventh in the line after Pahar Singh was Rajabikramajit Mahendra, with whom a treaty of "friendship and defensive alliance" was concluded by the British Government on 23rd December 1812.

The Preamble to the Treaty states that "the Rajah Mahendar Bickermajeet Bahadur, Rajah of Oorcha, "was" one of the Chiefs of Bundelcund by whom and his ancestors his present possessions have been held in successive generations during a long course of years without paying tribute or acknowledging vassalage to any other power".....Under Art. II "the territory which from ancient times has descended to Rajah Mahendar Bickermajeet Bahadur by inheritance, and is now in his possession is hereby guaranteed to the said Rajah and to his heirs and successors".

Rewa

The Rulers of Rewa are Baghel Rajputs. A member

of the family which ruled at Anhilwara Patan (1219-1296) migrated to Northern India from Gujerat and obtained possession of Bandhogarh. After the capture of Bandhogarh in 1597 by Akbar, Rewa became the chief town.

As a result of the Pindaree wars, there was suspicion regarding complicity of Rewa with the Pindarees and Raja Jai Singh Deo of Rewa was "required to accede to a treaty" on 5th October 1812. In Art. I and III of the treaty, there is specific acknowledgment of the sovereignty of the Ruler in "his own dominions" as "lawful possessor of the present dominions of Rewah, which have been held by him and his ancestors in successive generations during a long course of years."

The terms of the Treaty of 2nd June 1813 with Rewa are stringent since the Raja failed "to fulfil the engagements" of the Treaty of 1812 and the British Government had to "detach its troops into Rewah..... to obtain security" for the due fulfilment of engagements in future.

Rajputana States

General Background

The Pindaree plunderers gained in strength, thanks to the non-interference policy of Lord Cornwallis and the decline of Mahratta power. After the treaty with Scindia of 1817, the British Government got freedom to enter into separate relations with Rajput states. The object of the "treaties to be formed with them was the establishment of a barrier against the predatory system, and against the extension of the power of Scindia or

Holkar beyond the limits which Government designed to impose on it by other measures. It was not at that time proposed to acquire the power of exercising any interference in the internal administration of Rajput States; but to subject only their political measures and external relations to the control of the British Government; to secure to Scindia and Holkar, the tribute payable to them in the event of their entering into the policy of the British Government; and to secure such pecuniary aid as might be adapted to the means of the several states in order to indemnify the British Government for the charges incidental to the obligation of protecting them.”¹

In a chronological classification, the following treaties with Rajput States were made as hereunder:—

<i>State</i>				<i>Date of Treaty</i>
Alwar	..	..	..	4th November 1803.
Karauli	..	..	..	9th November 1817.
Kotah	..	..	..	26th December 1817.
Jodhpur	..	..	..	6th January 1818.
Udaipur	..	..	..	13th January 1818.
Bundi	..	..	..	10th February 1818.
Bikaner	..	..	..	9th March 1818.
Kishengarh	..	..	..	26th March 1818.
Jaipur	..	..	..	2nd April 1818.
Banswara	..	..	..	16th September 1818.
				Later Treaty 25th Dec. 1818.

¹ Aitchison, V. Ed., Vol. III., p. 1.

Partabgarh	..	..	5th October 1818.
Doongarpore	..	..	11th December 1818.
Sirohi	..	..	31st October 1823.

The Chiefs “were accordingly invited to ally themselves with the British Government on the basis of acknowledging its supremacy and paying a certain tribute, in return for external protection and internal independence.”¹

Udaipur

The Udaipur family is the highest in rank and dignity among the Rajput Chiefs of India. The present family was founded about 144 A. D. and the Maharana is believed to be descended through Kanak Sen, from the ancient Emperor Sri Ramachandra of Ayodhya. The States of Dungarpur, Banswara, Partabgarh and Shahpura are offshoots from it.

History records that Chitor had been ransacked thrice in 1303, 1534 and 1568. Mewar suffered depredations from the Maharattas after the treaty of Rana Amar Singh II with Jaipur and Jodhpur against Muhammadans in 1698. Peshwa Baji Rao demanded *Chauth* in 1736 from Mewar and Jagat Singh II agreed to pay annually Rs. 16,00,000 on account of *Chauth*.

On the withdrawal of British influence from Rajputana in 1806 under Lord Cornwallis’ policy, Mewar was laid waste by the armies of Scindia, Holkar, and Amir Khan and by many hordes of Pindari plunderers.

¹ Copies of *Treaties and Engagements*. 1853. Printed in return to an order of the House of Lords.

In 1817 the Maharana was found in a state of degradation when the British Government entered on its general policy of alliances for the suppression of the Pindarees. "Perpetual friendship, alliance, and unity of interests between the two states" was established under Art. I of Treaty of 13th January 1818. The British Government had introduced in this typical treaty the clauses of "protection," (Art. II), "Subordinate Co-operation" with the "British Government" (Art. III), prohibition of "any negotiation with any chief or state without the knowledge and sanction of the British Government" (Art. IV) and the assurance that the Ruler "shall always be absolute master of his own country" and that "the British Jurisdiction shall not be introduced into that principality." (Art. IX). Udaipur had continued her sovereignty in spite of plunders of her territory and exactions of *Chauth* while she was taken into the protective system of treaties of the period.

Jaipur

The Maharaja of Jaipur traces descent from Kush, one of the sons of Sri Ram of Ayodhya. Believed to have been founded in 1128 A. D. by Dulha Rai, Jaipur occupied a prominent position and Mirza Raja Jai Singh was a famous general of the Moghul Empire. Jaipur had to suffer much from the Mahrattas. Jaipur was one of the parties to the alliance of 1698 to resist Muhammadan power.

Relations of the British Government with Jaipur began in 1803. The general policy of the British Government at that time was to exclude the Mahrattas from northern India by uniting the Rajput princes in Subsidiary

Alliance with the British Government. A treaty of amity and alliance was concluded with Jagat Singh of Jaipur. Under Art. III of the Treaty the Honourable Company "shall not interfere in the Government of the Country possessed by the Maharajadhiraja and shall not demand tribute from him." The dissolution of this alliance by Sir George Barlow following the inconsistent policy of Lord Cornwallis could not be justified on higher grounds of preserving solemn covenants. Political expediency of such a type was rightly condemned by Lord Lake on grounds of "general policy and good faith." The Jeypore Agent observed to Lord Lake that this was the first time the English Government had been known to make its faith subservient to its convenience.¹

The Home Government very properly thought this dissolution of alliance questionable and directed in 1813 that Jaipur should again be taken under protection on a suitable opportunity occurring.

The suspicions of the Raja had to be got over and the atmosphere of insecurity due to Amir Khan's depredations was exploited for concluding a Treaty with Jaipur on 2nd April 1818. This was a treaty of perpetual friendship containing clauses similar to those of Udaipur.

Jaipur no doubt had succumbed to the Mussulmans in a period of her history. But it has to be noted that these Rajput States had thrown off the shackles of control by the Moghul Sovereign at the earliest time when it got weak. The Mahrattas under Holkar had asserted

¹ Copies of the Treaties and Engagements, 1853. Printed by order of House of Lords: p. 429.

supremacy over Jaipur. So far as Jaipur was concerned, she was exercising sovereign control over her territories subject to the Suzerainty of Holkar till the Treaty of Mandasor (1818).

Jodhpur (Marwar)

It was founded by Jodha, a reputed descendant of the Rathor Rajput Kings of Kanauj in 1459. Jodhpur became tributary to Akbar. In 1698, Jodhpur joined with Udaipur and Jaipur in an anti-Musalman alliance. Jodhpur was again conquered by Scindia who levied a tribute of 60 lakhs of rupees and took away Ajmere.

A treaty was concluded between British Government and Jodhpur identical in terms with that of Jaipur (and ratified by the Governor-General-in-Council on the same date *viz.*, 15th January 1804) in 1803. Mansingh of Jodhpur instead of ratifying it offered another treaty. His hostile attitude also led to its formal cancellation in 1804.

Internal succession disputes led to war with Jaipur when the free-booter Amir Khan resumed management of Jodhpur and plundered the territory for two years.

On the outbreak of war with Pindarees, Jodhpur was taken into Protective alliance on 6th January 1818. Under Art. VI of the Treaty the tribute "hitherto paid to Scindia by the State of Jodhpur.....shall be paid in perpetuity to the British Government and the engagements of the State of Jodhpore with Scindia respecting tribute shall cease."

Bikaner

The royal family belongs to the Rathor Rajputs.

The city was founded in 1488. The sixth Ruler, Rai Singh became "a leader of horse in Akbar's service and received a Grant of fifty-two parganas including Hansi and Hissar, and also the title of Raja." The ninth Ruler, Raja Kasan Singh succeeded in 1631 and his sons Padam Singh and Kesari Singh rendered great service to Aurangzeb and received a Grant of land in the Deccan. Raja Anup Singh, the tenth Ruler, also rendered important services to the Delhi Emperors and received the title of Maharaja. The Bikaner State had paid no tribute to the Mahrattas.

The Chief of Bikaner had applied for protection of the British Government in 1808 "when his territories were invaded by a force from Jodhpur and other States, but interference on the part of the British Government was contrary to the policy which then prevailed of withdrawing from all connection with the Chiefs to the west of the Jumna."¹ Later, Bikaner was taken into the vortex of Protective policy through a treaty of 9th March 1818.

Alwar

Till the middle of the eighteenth century, the petty chiefships now constituting Alwar owed allegiance to Jaipur and Bharatpur. During the minority of the Maharaja of Jaipur, the southern portion was usurped about 1780 by Pratab Singh of the clan of Naruka Rajputs, a fief-holder from Jaipur of Macheri. His adopted son Bakhtawar Singh succeeded him. The British Government concluded a treaty of 'permanent friendship'

¹ Aitchison, IV. Ed, Vol. III, p. 337.

with him on 14th November 1803. No tribute was demanded from him and 'a guarantee for the security of his country against external enemies' was given through Art. V of the Treaty. Since the Treaty of 1803 did not contain any express prohibition of political intercourse with other states without the cognizance and approval of British Government, another engagement had to be concluded on 16th July 1811 making this prohibition definite.

Bharatpur

This is a Jat principality founded by a frontier free-booter, Birj. During the decline of the Moghul Empire, his great grandson Surajmal extended the power of the State. He was killed in 1763. Ranjit Singh, one of his sons, called in the aid of Najaf Khan against his brother, Nawal Singh. Scindia came into the possession of the territory. At the intercession of the widow of Surajmal Singh, Scindia gave Ranjit Singh eleven parganas. Three more parganas were added as a reward for services rendered to General Perron. These fourteen parganas constitute the State of Bharatpur. As a result of a treaty with British Government in 1803 five more districts were conferred upon the Ruler. Holkar after the battle of Dig took refuge at Bharatpur. His surrender was refused. Ranjit Singh made a memorable defence. At last he had to surrender to Lord Lake. A new treaty was concluded in 1805 which contains two restrictive clauses as compared with the Treaty of 20th September 1803. Under Art. VII of the Treaty of 1805, the Company becomes guarantee "to the Maharaja Ranjeet Singh for the security of the country against external enemies."

The Maharaja shall "not in future entertain in his service, nor give admission to any English or French subjects or any other person from among the inhabitants of Europe, without the sanction of the Honourable Company's Government" (Art. VIII).

Jammu and Kashmir

Jammu has been the capital from hoary antiquity of a Dogra Rajput dynasty. Gulab Singh, a great grand-nephew of Ranjit Singh, the lion of Punjab, had distinguished himself in 1820 in the capture of the Chief of Rajuori. The principality of Jammu annexed by Ranjit Singh was conferred by Ranjit Singh on Gulab Singh with the title of Raja.

Till 1834, Ladakh appears to have been a tributary of Kashmir. Baltistan continued independent till 1840. Ladakh and Baltistan were conquered in successive campaigns by Gulab Singh's troops led by Zorawar Singh and Diwan Hari Chand between 1834 and 1842. After the expeditions sent by Maharaja Sri Gulab Singh of Jammu in 1841 and the compulsory retirement of the Chinese to Rudok, a peace was signed between the Lhasa Government and Maharaja Gulab Singh in 1842 establishing the former boundaries of Ladakh:—"We shall neither at present nor in future have anything to do or interfere at all with the boundaries of Ladakh and its surroundings as fixed from ancient times and will allow the annual export of wool, shawls, and tea by way of Ladakh according to the old established custom."

Ruled first by Hindu and Tartar kings, succeeded by a Hindu dynasty till fourteenth century and usurped successfully by Muhammadans, Kashmir was conquered

by Akbar in 1588. Till the latter half of the eighteenth century, Kashmir continued under Moghul regime. Ahmad Shah Abdali held sway over it and Kashmir was ruled from Kabul till 1819 when Ranjit Singh wrested it from the Afghan Governors. The Lahore Durbar sent Gulab Singh to Kashmir as Governor.

Gilgit

Till the beginning of nineteenth century, Gilgit had the rule of Rajas of the Trakhane Dynasty. Between 1810 and 1842, there was a succession of revolutions. One of these aspirants for power, Karim Khan, applied for aid to the Governor of Kashmir. A Sikh force was despatched which defeated Gauhar Amman; and Karim Khan was installed in 1842 as Raja of Gilgit in subordination to the Sikh Government.

Thus, during the Sutlej Campaign, Gulab Singh held Jammu and the Hill Chiefships in a state of subjection and Ladakh and Baltistan by right of conquest. As a principal leader of Sikhs and great grand-nephew of Maharaja Ranjit Singh, Gulab Singh held Kashmir with Sovereignty over Gilgit.¹

The battle of Sobraon was followed by the British occupation of Lahore and the submission of Sikhs. The Treaty of Lahore of 9th March 1846 was signed. The British Government demanded from the Lahore State an indemnification of one and a half crores of rupees and the Lahore Government being unable to pay the whole of this sum, the Maharaja ceded "to the Honourable Company in perpetual sovereignty as equi-

¹ Aitchison, V. Ed., Vol. XII, p. 3.

valent for one crore of rupees, all his forts, territories, rights, and interests in the hill countries which are situated between the rivers Beas and Indus, including the provinces of "Cashmere and Hazarah" (Art. IV).

Through a separate treaty between the British Government and Maharaja Gulab Singh in person (Treaty of *Amritsar* dated 16th March, 1846) foreshadowed in Art. XII of the Treaty of Lahore, the British Government transferred and made over for ever "in independent possession to Maharaja Gulab Singh and the heirs male of his body, all the hilly and mountainous country with its dependencies, situated to the eastward of the river Indus and westward of the river Ravee, including Chamba and excluding Lahul, being part of the territories ceded to the British Government by the Lahore State, according to the provisions of Art. IV of the Treaty of Lahore dated 9th March, 1846" (Art. I).

Under Art. II the Eastern boundary was to be fixed after fact-finding by Commissioners appointed by both Governments and defined in a separate engagement.

In consideration of the "transfer made to him and his heirs by the provisions of the foregoing.....Maharaja Gulab Singh will pay to the British Government the sum of seventy five lakhs of rupees,.....fifty lakhs to be paid on ratification of this treaty and twenty-five lakhs on or before the first October 1846" (Art. III).

Maharaja Gulab Singh will in token of acknowledging the supremacy of the British Government "present annually to the British Government one horse, twelve perfect shawl goats of approved breed (six male and six female) and three pairs of Cashmere Shawls." (Art. X). In 1859, it was mutually arranged that the Maha-

rajah should present three square shawls instead of "twelve shawl goats." On 16th May, 1893 the Government of India decided that the horse, trappings, *pashm*, and yarn which formed a portion of the annual tribute from the Kashmir State would no longer be required and since 1929 it consists of three square and two long shawls.

Maharaja Gulab Singh had some difficulty to get possession of Kashmir and Sheik Imam-ud-din of Kashmir was quelled by British troops and Lahore Durbar.

While describing the title of Maharaja Gulab Singh to Kashmir the usually correct official chronicler has indulged in a historical and legal inaccuracy:—"Thus the present State of Jammu and Kashmir was created by the British Government, when Ghulab Singh was established as Maharaja under the Treaty of Amritsar."¹ The inaccuracy is repeated in another form in a later edition thus:—"Ghulab Singh owed not merely his title to Kashmir, but his actual possession of it, wholly to the support of the British power."²

Gulab Singh's title to Jammu, Ladakh, and Baltistan has been correctly stated by the official compiler as through conquest; a reference to a standard work on '*International Law*' recommended for testing entrants into the Political Department (Government of India)—will reinforce the well-established proposition that a "state can acquire sovereignty through *purchase*."³ The controversy, for instance, between U. S. A. and Russia

¹ Aitchison, IV. Ed., Vol. XI, p. 247.

² Aitchison, V. Ed., Vol. XII, p. 3.

³ Wheaton, *International Law*, IV Ed., pp. 267-268.

respecting the north-west Coast of America leading to the Convention of 1825 at St. Petersburg, was finally set at rest by the purchase by U. S. A. of the whole territory of Alaska from Russia in 1867 for the sum of 7,200,000 dollars. Or again, by the Treaty of Paris of 1803 between France and U. S. A. Bonaparte the first consul, resolved upon the expedient of selling *Louisiana* his new or "rather inchoate acquisition to U. S. A." The IX Article of the Treaty provided that two particular conventions should be considered as inserted in the treaty itself:—(a) sixty million of francs should be paid to France.

(b) All claims upon France by U. S. A. for illegal captures or other matters should be considered as discharged.

This instance, points out Phillimore, illustrates "national acquisition by gift, sale and exchange and that the title of U. S. A. to this acquisition has never been questioned."¹

Art. I and II of the Treaty of Amritsar (1846) read together can in law lead only to the necessary result of acquisition of *Sovereignty* by Maharaja Ghulab Singh over Kashmir through *purchase*.

Patiala

Emperor Babar conferred on Bairam a *chaudhriyat* after the battle of Panipat (1526). This was also confirmed by Shah Jehan through a *firman* to Chaudhri Phul.

¹ Phillimore, Vol. I., pp. 294-295.

Passage of Phillimore approvingly cited in Hall, *International Law*, VI Ed., p. 119.

Chaudhri Phul died in 1652 leaving behind two sons. A descendant in the junior branch, Sardar Ali Singh founded Patiala in 1762. The descendants of the senior branch founded Jind and Nabha. Compendiously, these three states which are identical in status are called Phulkian States.

Sardar Ali Singh received the title of Raja from Ahmad Shah Abdali. The relations with British Government began in 1808. In February 1809 the Chief Sahib Singh welcomed Colonel Ochterlony. During the Nepalese War, Karam Singh aided the British Government with troops. Eleven Purganas were granted to Raja Karam Singh "and his heirs for ever" through a *Sunud* of 20th October 1815. The Raja was to consider the *Sanad* 'a legal and valid instrument.' A similar *Sanad* of the same date gave the Raja portions of Keonthal and Baghat States in return for a payment. It was the luck of the Phulkian States to get territorial rewards for their loyalty in the Nepalese War, war with Lahore State and the Indian Mutiny of 1857. A third *Sanad* was issued on 22nd September 1847, and a fourth *Sanad* on 5th May, 1860. In the *Sanad* of 1860, the Viceroy was "pleased to approve of the Grant of the.....*Sanad* by way of treaty." A portion of the Kanaud pargana of the Jhajjar territory and the taluka of Khamanum were sold to the Maharaja in perpetual sovereignty in liquidation of debts due to him from the British Government. (*Sanad* of 1861).

Jaisalmere

The ruling family claims descent from Yadava Kings. The first Rawal was Deoraj born about the mid-

dle of the tenth century. Rawal Jaisal built the present capital in 1156. Owing to its isolated situation, Jaisalmer escaped the onrush of the Maharattas. The British Government entered into political relations with Maharawal Mulraj in 1818. A treaty was concluded on 12th December 1818. The Jaisalmer treaty has clauses worded differently. The usual clause of protection which is found in Jodhpur, Udaipur, Kishengarh, and Jaipur treaties runs thus:—"The British Government engages to protect the principality and territory of Kishengarh." Art. II of Jaisalmer treaty states that "the posterity of Maha Rawal Moolraj shall succeed to the principality of Jaisalmer." "In the event of any serious invasion directed against the overthrow of the principality of Jessulmer or other danger of great magnitude occurring to that principality, the British Government will exert its power for the protection of the principality, provided that the cause of the quarrel be not ascribable to the Rajah of Jessulmer." (Art. III).

Orissa States

Of the present so-called twenty-six Orissa states which have been grouped together for purposes of administrative supervision, unwitting injustice has been done in bringing down the status of Keonjhar and Mayurbhanj States. Until 1803, the tributary Chiefs of Orissa were feudatories of the Raja of Nagpur. The plains of Orissa had been brought under British Rule and negotiations were entered into with the Hill Chiefs, in November 1603; treaty engagements were executed by and *Kaul-namas* given to, the Rajas of Narsinghpur, Tigaria, Dhenkanal, Ranpur, Baramba, Khandpara, Nayagarh,

Talcher, Daspalla, Athgarh, Nilgiri, Hindol, Banki and Angul.

On 2nd November 1803 the Marathas had a defeat at the Barmul Pass which led to the submission of the Rajas of Bond and Sonpur. In the Treaty of Deogaum on 17th December 1803 between "the Honourable East India Company and Sena Saheb Soubah Raghojee Bhonsla," it was stipulated that "certain treaties (had) been made by the British Government with feudatories of Senah Saheb Soubah. These Treaties (were) to be confirmed." (Art. X). In a footnote referring to this clause in Aitchison¹ it is stated that "the Rajah manifested the utmost reluctance to ratify this clause, and it was only under the threat of renewed hostilities that he consented to sign the lists."

In 1862, adoption Sanads were issued to all of them and in 1874, the hereditary title of Raja was conferred on them all. In 1888 it was decided by the Secretary of State in Council in accordance with a ruling of the Calcutta High Court in the case of Morbhanj² that these seventeen states did not form part of British India and in consequence of this decision new *Sanads* were given on 27th October 1894 to all the Chiefs defining their status, powers and position. Further revisions of *Sanads* took place in 1908, 1915 and 1937.

On 11th March, 1882, the Full Bench of the Calcutta High Court has held in *Empress vs. Keshab Mebajan and others*³ that "no direct civil jurisdiction has ever

¹ Aitchison, IV Ed., Vol. I, p. 416.

² 8 C. 985, F. B. (1882).

³ 8 C. 985, F. B. at 990, per Pontifex, J.

been exercised in the territory (Mohurbhunj) by the Executive Government of India. Lord Canning's *Sanad* distinctly deals with the territory as independent and not British territory." In an otherwise valuable report, a process of wishful thinking has been indulged in to bring down the status of Mayurbhunj and Keonjhar by citing minority views of the learned Judges in the Calcutta Case and an irregular report of the Superintendent, Tributary Mahals, Orissa to the Secretary to the Government of Bengal bearing the date 15th May 1882.¹ In this copy of the official report it is stated that the Tributary Chiefs "have long been deprived of the essential privileges of Sovereignty." The points raised in the particular controversy of the right of capturing wild elephants in those states, have been in a legal sense admitted as having existed when the Superintendent stated that these principalities had been deprived of the essential privileges of Sovereignty "without and against *their consent*." The administration of civil and criminal justice vested with Rulers. The Chiefs were not sued in the Civil Courts of British India. Lord Canning had issued Sanads of adoption to the Chiefs of the "*territories*." Very properly, the Secretary of State has overruled these reactionary statements of aggressive officials by issuing new Sanads in 1894, in pursuance of the Calcutta Full Bench decision.

Keonjhar

The two cases of Keonjhar and Mayurbhunj serve

¹ *The Orissa Reforms Enquiry Committee Report*, 1937, Appendix V.

as signal instances where the Political authorities have ignored the clauses of the old treaty-engagement and virtually superseded the treaty-engagement by a series of subsequent *Sanads*.

The status under the Treaty engagement of Keonjhar is quite distinct from and indeed superior to the rest of the Orissa States. Keonjhar, is not one of the feudatories of the Raja of Nagpur included in Art. X of the Treaty of Deogaun. In his despatch to the Court of Directors of the East India Company dated 13th July 1804, Marquess Wellesley described Keonjhar as a powerful chieftain of the province of Cuttack. The legal status of Keonjhar is reflected in the terms of the Treaty and *Kaulnamah* (16th December 1804). By the first clause of the Treaty-engagement Raja Junardun Bhunj undertook to "*continue in constant friendship* with the Honourable East India Company holding (himself) in submission and loyalty to them and regarding their enemies as his enemies." This clause reads distinctly from those of other Orissa states which bind the chiefs "to always maintain" themselves "in submission and loyal obedience," (vide Treaty-engagements of Killah Kanika, Killah Duspulla) to the East India Company. It is submitted that the wording of this additional undertaking in the Keonjhar treaty about continuance of "constant friendship" with the Company and regarding "their enemies as his enemies" greatly mitigated the humiliation underlying the profession of "submission and loyalty." This places the Keonjhar Treaty-engagement in the same category as those with more prominent states as for instance the Rajputana States.

Again, under Clause V of the Keonjhar Treaty

engagement, the Raja of Keonjhar engages merely to "take measures of precaution and care within (his) own territory" and prevent the passage through it of any troops who may be enemies of East India Company. The other Orissa States, however undertake to afford a passage of the East India Company's troops through their territories and ensure the "supply of all *russud* and supplies" to them at fair price and guarantee safe passage to all subjects of the Company's Government through the state boundaries (vide Cl. V in the Treaty-engagements of Mohur Bhunj, Killah Kanika Nilgiri, and Killah Duspulla). These terms by contrast show a degree of subordination not to be found in Keonjhar Treaty Engagement.

Further, through Clause VI of their engagements, the other Orissa States undertake to depute their troops to co-operate with the East India Company's forces in subduing rebellions against the Company. There is no such obligation in the Keonjhar Treaty Engagement of five clauses.

Taking the *Kaul-namah* or Counter-Engagement to Rajah of Keonjhar given by the Company, the first clause cites an agreement that "the whole of the lands etc.....which were in the possession and enjoyment of...the Rajah of Keonjhar.....shall belong in perpetuity" to the said Raja. This is not found in the *Kaulnama* given to other Orissa States.

The third clause of the *Kaulnama* given to Keonjhar lays down "that any just representation" made by the Raja of Keonjhar will "receive an answer in accord with the *amity* subsisting with the said Raja" the Raja was treated on terms of "constant friendship and amity"

when the first treaty engagement was concluded in 1804. The corresponding clauses in the other *Kaulnamas* emphasize the subordinate character of the Rulers and give an assurance of impartiality to them. Further they state that "any just representation or complaints made to the Government by the Raja will meet with a decision in accord with justice." While thus in regard to representations Keonjhar is assured of an "answer" in conformity to its friendly relationship with the Government, the other states are assured of a just "decision" by the Company.

On account of its geographical position it had to be classified with states which had been transferred from the suzerainty of the Bhonsle Raja of Nagpur through the Treaty of Deogaon (1803). The *Sanads* of 1894, 1915, and 1937 have brought further restrictions in her internal autonomy that in this case uniformity of terminology has tended "to obscure distinctions of status and practice appropriate in the case of the lesser chiefs" has been "inadvertently applied to the greater ones also."¹ These *Sanads* are merely *unilateral instruments imposed on the States against their will*.

Mayurbhanj

Mayurbhanj's history is traced to pre-historic times. In the pre-British period in 1591 A. D. twelve zamindaris containing forty-two *Killas* (fortresses) were under her control. An armed encounter took place in 1660 between the Moghul Governor of Orissa and Maharaja

¹ Montagu-Chelmsford Report on Indian Constitutional, Reforms.

Krishna Bhunj of Hariharpur (the then Capital of Mayurbhunj). Another conflict took place between Nawab Ali Vardy Khan of Bengal and the Maharaja of Mayurbhunj (1742). It is doubtful whether Mayurbhunj was ever really subdued by the Mahrattas.

In 1761, the officers of the East India Company "professed friendship for the Raja of Mayurbhanj." Long before the British conquest of Orissa in 1803, Mayurbhanj had established friendly political relations with the East India Company. Mayurbhanj had also assisted the British Government against the Mahratta power in the Conquest of Orissa.

No treaty was concluded with Mayurbhanj till 1829, as the Special Commissioners of the East India Company had pointed out in their letter dated 5th December 1803 that they "considered it highly important to proceed with great caution in any arrangement relating to Mayurbunge."

The Treaty of 1829 should be deemed the basis of a permanent alliance as Raja Jadoonauth Bhunj Bahadur "engaged for (himself), (his) heirs and successors." (Cl. II). The Treaty engagements of Nilgiri, *Killab* Keonjhaur, *Killab* Duspulla, Boad and Atmullick, and *Killab* Kamka do not have the words "heirs and successors" in the clause undertaking to pay *peshcush* or tribute.

Under the seventh clause of the Treaty-engagement, the Raja relinquished a claim on the Company's government "on account of the Khoonta *ghat* or ferry." Such a relinquishment shows a recognition of the sovereign power of the Chief by the East India Company.

No restrictions on the internal sovereignty of the territory were placed by the treaty-engagement on its

ruler. But her contiguity to the *Killas* and States transferred from Bhonsla Raja was bound to affect her status.

It must be stated that Mayurbhunj has never acquiesced in the restrictions of its powers and privileges, having protested against every subtle invasion into her rights made through administrative officers or the Sanads of 1894, 1908, 1915 and 1937. Thus an encroachment was made in 1880 through a declaration to assert the right to catch elephants. An effective protest was made and the matter continued to be agitated till 1908 when the restrictions were modified, the Rajas conforming to advice in regard to "arrangements for catching elephants."

So far as the *Sanad* of 1894 is concerned, it made a serious encroachment on the rights of the Chief. The then Ruler of Mayurbhunj, Maharaja Surain Chandra Bhanj Deo obtained the opinion of the Hon'ble Mr. J. T. Woodroffe, then Advocate-General of Bengal on the *Sanad* and was advised by him that the *Sanad* "in various ways derogated from his rights as the Ruler of a Tributary State possessing, under the *Suzerainty* of the Queen-Empress of India, sovereign powers, which though not unlimited are yet of considerable extent and that the Raja, should, without delay, memorialize His Excellency with respect to that *Sanad* and ask for its withdrawal or amendment." The memorial of the Raja failed to achieve its object. It is learnt, however, that the criminal power of the Ruler was extended under the discretionary provisions of the *Sanads* of 1908, 1915, and 1937. The provisions in the *Sanads* regarding criminal powers and the clause which required the chief "to comply with the wishes" or "act in accordance with

.....advice of the Agent to the Governor-General" (*Sanad* of 26th February 1937)—these two curtailments could not be justified either from past history of the State, the Treaty-engagement of 1829, or any other source of legal rights.

The Kathiawar States

Though overtures were made in December 1803 by certain chiefs as those of Joria and Morvi for protection, relations with either the Gaekwar or the Peishwa had not by then become crystallized. The rights of the Chiefs of Kathiawar were not known definitely. Circular letters were addressed by Colonel Walker, Resident of Baroda to "twenty-nine of the principal Chiefs" before the joint forces of the British Government and the Gaekwar advanced into Kathiawar in 1807.

Though the Government of India have later on declined to regard the *Fael Zamins* or Security bonds executed in 1807 as "treaties or agreements covering all their political relations with the States of Kathiawar,"¹ it must not be missed that in the then political conditions a guarantee by the Peishwa, the Gaekwar and the British Government would alone satisfy these chiefs.

In 1804, Colonel Walker wrote regarding the status of Kathiawar states thus:—"With the reservation of their acknowledged tributary payments the Kathiawar States are independent and at liberty to form connection with other Powers. They are not under obligation of service and neither the Peishwa nor the Gaekwar pretend to exercise any authority in Kathiawar beyond the pay-

¹ Aitchison, V. Ed. Vol. VI. pp. 6 and 7.

ment of their respective tributes.....except in the payment of their Jamabandy, the Chiefs such as Ryas, Rawals, Thakores and Girassias were in possession and exercise of their interior right of sovereignty.....in respect to exterior relations they appear to have exercised the same freedom.....nor does it appear that any of the States to whom they pay tribute ever interfered in their transactions whether foreign or domestic so long as they were not inimical to themselves.” (Colonel Walker: *Report on the Settlement of Kathiawar*.)

Colonel Walker's arrangements of 1807 were of two kinds. The first form was called “*Fael Zamin*” which was a security bond providing for the general peace of the country and the protection of the possessions of the British Government, the Peishwa, and the Gaekwar. The second kind of engagement was for the payment of a fixed revenue in perpetuity. After these engagements under which the chiefs gave security bonds not to “commit robberies or make any plundering incursions”¹ *inter alia*, were concluded, a memorandum of the engagement was given to each Chief under the guarantee of the British Government.

With the marching of the subsidiary force on Poona, the Peishwa had to sign the Treaty of 1817, and under Art. VII of the Treaty the Peishwa “ceded in perpetuity” his rights in Kathiawar. Through the agreement with the Gaekwar of 3rd April 1820 the Gaekwar engaged “not to send his troops” into Kathiawar and not “to prefer any claims against the Zamindars.....except through the arbitration of the Company's government.”

¹ Aitchison, IV. Ed. Vol. VI. pp. 112, 113.

In 1820 by a dual source of rights flowing from the Peishwa and the Gaekwar, the British Government had become overlords of these petty chiefs. In some States such an exclusive authority had to be got only in 1850.

The principle of security bonds was further developed in 1821-22 and in all 147 bonds were taken. These have been correctly classified under five heads in Aitchison:—¹

I. Those in which the taluqdars are responsible for compensation *or* for the production of the thief.

II. Those in which the taluqdars are responsible for compensation as well *as* the production of the thief.

III. Those in which the taluqdars only bind themselves to abstain from annoying merchants and travellers and to give them guards until they leave their territories and are not liable for compensation for robberies or for the production of the thief.

IV. Those in which the taluqdars bind themselves that, if the tracks of any bad character enter the lands of any village of their taluka, they will carry them in or become responsible in any way that the Government may direct.

V. Those in which the Taluqdar is responsible for highway robberies absolutely and no reservation is made regarding the production of the thief.

The Chiefs of Palitana and Lathi “do not appear to have been ever called upon to give formal security in this way.”

These different bonds apply, class for class, to the various states as follows:—

¹ Aitchison, IV. Ed. Vol. VI. pp. 78-79.

- No. I—Junagadh, Bhavanagar, Durangdhara, Morvi, Wankaner, Dhrol, Rajkot, Jetpur, Jasdan.
- No. II—Porbandar, Wadhwan, Gondal.
- No. III—Limri.
- No. IV—Vanod, Dasara, Chura, Than-Lakhtar and Limri Muli, Wadhwan, Sayla and Mirpur.
- No. V—Other States. Junagarh and Bhavanagar.

In 1863, there was a reorganization by arranging in seven classes all the Chiefs of Kathiawar and defining their powers and extent of their jurisdiction.

It has been held that judicial enquiry cannot be denied to parties who challenge the most formal notifications of Government.¹ It has been held by the Privy Council that Kathiawar is not within King's Dominions. Further, the Jurisdiction exercised by the Political Agents was political and not Judicial in character. (1906 A. C. 237, at 240)

From facts of Indian political experience, Sir Henry Maine has evolved his division of sovereignty after realizing the "difficulty of applying international rules and conceptions in India."² In his view, some measure of sovereignty remained with the Kathiawar States.

¹ *Damodhar Gordhan vs. Deoram Kanji*. 1. B. 367 P. C. and *Triccam Panuchand vs. B. B. and C. I. Ry. Coy.* 9 B. 244. Vide *Hemchand vs. Sakerlal* 1906 A. C. 237.

² Sir Henry Maine's Minute on the Kathiawar States. Dated 22nd March 1864.

The Mediatized Chiefs of Central India

When British power was introduced in 1818 after the subjugation of the Pindarees, the smaller States in Malwa and Central India were under tributary obligations to Scindia, Holkar or the powers of Dhar and Dewas and sometimes to all these Chiefs. The British Government would not let slip such "an opportunity of breaking the continuity of the influence of the Mahratta Powers." The policy pursued by the British Government was "to declare the permanency of the rights existing at the time of the British occupancy on condition of the maintenance of order, to adjust and guarantee the relations of such chiefs as owed mere subordination or tribute, so as to deprive the stronger powers of all pretext for interference in their affairs; and to induce the plundering leaders to betake themselves to peaceful pursuits either by requiring their superiors to grant them lands under the British Guarantee or by guaranteeing to them payments equivalent to the *tankas* which they levied."¹

Sir John Malcolm while he addressed himself to this hard administrative duty of settling Central India, wrote with pardonable pride that his room was "a thorough-fare from morning to night.....(with his) nabobs, rajahs, Bheel Chiefs, pettyls, and ryuts."²

The results of these measures, describes Sir John Malcolm, "were a virtual surrender of the supremacy over the petty States and chiefs to the British Government, the reduction of the military classes to the control of the

¹ Aitchison, V. Ed. Vol. IV. p. 5.

² Malcolm's Letter to Mr. Haliburton. Cited in Kaye's "*Life and Correspondence of Sir John Malcolm*." Vol. II, p. 307.

British power; and the cessation of ruinous interference in the affairs of the smaller states on the part of their more powerful neighbours.”¹

The agreement signed by the Rajah of Rutlam, for instance, to “Bapoo Scindia, concluded through the mediation and guarantee” by John Malcolm in the name of the English Government of 5th January 1819, Bapoo Sindhia agreed to receive the “Rutlam *tankha* of Rs. 84,000”.....and bound himself “to abstain from all interference whatever in the administration of the Raja’s Government”.....“nor shall any of his troops in future be stationed in the Rajah’s country.”

The degree of interference exercised by the British Government in the affairs of the guaranteed chiefs varies with “the nature of the engagements concluded, which were very numerous and diverse in character; some being in the form of engagements between the superior state and the subordinates guaranteed by the British Government; others being *Sanads* or deeds issued by the representative of the British Government either alone or conjointly with the ruler of the superior State; and others being mere orders or *parwanas* issued by the Superior Chief to which the representative of the British Government attached his signature as Guarantee. Although there is very great diversity in their tenures, the guaranteed chiefs may all be divided roughly into three main classes.

(i) Those Chiefs in the administration of whose affairs the interference of the Superior is excluded by the express terms of the guarantee.

¹ Malcolm. *Central India*.

(ii) Those Chiefs whose *Sanads* contain no such stipulation; and

(iii) Those Chiefs who possess no *Sanads* at all.

The second class may be further subdivided into those in the administration of whose affairs interference is (a) now excluded by practice, and (b) still exercised.”¹

¹ Aitchison. V. Ed. Vol. IV. p. 5.

CHAPTER III

NATURE AND ANALYSIS OF TREATIES, ENGAGEMENTS AND SANADS

International treaties are conventions or contracts between two or more states concerning various matters of interest. A treaty being a solemn agreement "must not be confused with various documents having relation to treaties but not in themselves treaties." These various documents are thus exhaustively dealt with by Oppenheim:—

"A *memoir*¹ is a diplomatic note containing a summary exposition of the principal facts of an *affair*.

"A *proposal* is a document comprising an offer submitted by one state to another.

"A *note verbal* is an unsigned document containing a summary of conversations or of events and the like.

"A *proces-verbal* is the official record or minutes of the daily proceedings of a conference and of the provisional conclusions arrived at and is usually signed by the representatives of the parties.

"The term *protocol* is used to denote the same thing as a *proces-verbal* or more correctly an international agreement itself, though usually one of a supplementary nature or of a less formal and important character than a treaty.

¹ Oppenheim. *International Law*. Ed. by Dr. A. D. McNair IV. Ed. Vol. I. p. 700, Vide McNair, *Law of Treaties*, 3-6.

Every diplomatic agent must have a "full power" authorizing him to conclude and sign a treaty besides his general letters of Credence. Is the Sovereign "bound to ratify in pursuance of the promise contained in the full power?"¹ Grotius and Puffendorf consider treaties signed by public ministers as binding on the Sovereign.² Bynkershoek is the father of the modern view. According to him, "the usage of nations.....required a ratification by the Sovereign to give validity to treaties concluded by his minister, in every instance except in the very rare case where the entire instructions were contained in the patent full power."³ Vattel considers the Sovereign as bound by the acts of his minister "within the limits of his Credentials." "The rights of the agent," says Vattel "are determined by the instructions that are given himBefore a Sovereign can honourably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons and in particular, he must show that his minister has deviated from his instructions.....Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose and are commonly called plenipotentiaries. To this office we may apply all the rules of natural law which respect things done by Commission."⁴

¹ Vide *Wheaton: International Law*. Vol. I, VI. Ed. pp. 490-494 for an illuminating research into the evolution of the doctrine of ratification of treaties.

² *De Jure Belli Ac Paris*. lib ii. Cap. 15, § 16; lib iii. Cap. 22 §§ 1-3.

³ *Quaestiones Juris Publici*. lib ii. Cap. 7.

⁴ Vattel. *Droit des Gens*, liv. ii. Ch. 12. § 156. For the practice of Great Britain, vide McNair, "*Law of Treaties*," pp.

The acts of public ministers under full powers have been considered from very early times as *subject to ratification*. Wheaton records in strong support an early example of the Treaty of Peace concluded in 561 A. D. by Emperor Justinian with Cosroes I, King of Persia. Both the preliminaries and the definitive treaty signed by the respective plenipotentiaries were subsequently ratified by the two monarchs and the ratification formally exchanged.

Sir Robert Adair, a trained diplomat, assigns the reason for this practice. "The forms in which one state negotiates with another," says Sir R. Adair, "requiring, for the sake of the business itself, that the powers to transact it should be as extensive and general as words can render them, it is usual so to draw them up, even to a promise to ratify; although in practice, the non-ratification of preliminaries is never considered to be a contravention of the law of nations. The reason is plain. A plenipotentiary, to obtain credit with a State on an equality with his master, must be invested with powers to do and agree to, all that could be done and agreed to by his master himself, even to the alienating the best part of his territories. But the exercise of these vast powers always under the understood control of non-ratification is regulated by his instructions."¹

General Washington's message of September 17, 1789, stated that no treaty should be considered "final and conclusive until ratified by the Sovereign." As

83-97: Vattel's foregoing passage is found cited in a Report of the Queen's Advocate dated December 23rd 1846.

⁷⁵ Adair. *Mission to the Court of Vienna*. p. 54.

Prof. Keith puts it, this doctrine renders "refusal to ratify always legal, and makes the issue of justification merely one of moral obligation." To like effect is the view of Prof. Hall, that "a State must be left to exercise its discretion subject to the restraints created by its own sense of honour and the risk to which it may expose itself by a wanton refusal."¹

As Marshall C. J. has laid down, a treaty is "in its nature a contract between two nations. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial but is carried into execution by the sovereign power of the respective parties to the instrument."²

The weight of modern authority is that treaties "regularly require ratification even if this is not expressly stipulated;" there are exceptions to this rule.³ The earlier view of international publicists and the modern well-recognized customary rule of international law are thus correctly summed up by Crandall⁴—"By the early writers on international law, living at a time when the theory of personal Sovereignty generally obtained and the negotiator was the immediate agent of the Sovereign, the rule of the Roman law that the principal is bound by the agent acting within his powers, was applied to treaty negotiations. The advantages of entrusting full and general powers to the negotiators and the importance of the trust have led recent writers⁵

¹ Hall, *International Law*, VIII Ed. p. 387.

² *Foster vs. Neils on*, 1829 2 Peters. 253 at 314.

³ Oppenheim, *International Law*, V. Ed. Vol. I. p. 713.

⁴ Crandall, *Treaties, their making and enforcement* II. Ed §3.

⁵ Among recent writers a large majority including Heffter,

quite generally to admit the right of ratification, even if no express reservation be made in the Treaty or full powers. A reservation of this right is now by the practice of nations to be read into the full powers of the negotiator."

An instructive effort at clarification has been made by Mr. C. G. Fitzmaurice¹ who distinguishes clearly between ratification used in the international sense and ratification used in the constitutional sense which is a purely domestic act. The treaty-making power in the United Kingdom, for instance, is vested in the Crown and that the approval of Parliament need not be obtained before a treaty engagement is entered into. But, as Dr. McNair has put it "even the fact that the treaty is internationally binding upon the United Kingdom does not enable a British Court to give effect to it municipally if it should conflict with the Law of the Land" (McNair, *Law of Treaties*, 1938, p. 8. Also Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 A. C. 326 at 347). But the view of Fitzmaurice following the older authorities as Phillimore "that there is no such general rule of international law that all treaties need ratification" is opposed to the weight of modern authority and practice.²

Holtzendorf, Fiore, Calvo, Rivier, Nys, Von Liszt and Westlake take this view. The contrary view is only held by Phillimore, Klüber, de Martens, Bluntschli and Merignhac.

¹ *British Year Book of International Law* 1934, pp. 113-137.

² In the case of *the Oder* (P. C. I. J. Series A. No. 23 pp. 17-21). The Court restated the "ordinary rule of international law.....that Conventions, save in certain exceptional cases are binding only by virtue of ratification." For the *rationale*, for ratification, vide *Oppenheim International Law*, V. Ed, Vol. I. pp. 712-713.

Invariably, all treaties and engagements with the Indian States bear the subsequent dates of ratification. Duplicate copies or triplicates of the Treaty are "engrossed upon parchment and after signature by the parties concerned, they are transmitted to the Government of India for ratification."¹ Eg., Engagements of Guarantee with the Nawab of Rampur of 13th December 1794, ratified by the Governor-General, 6th March 1795; Treaty with Alwar of 14th November 1803 ratified by the Governor-General-in-Council 19th December 1803; Treaty with Gwalior dated 27th Feb. 1804 ratified on 23rd March 1804. Treaty with Travancore of 12th January 1805 ratified by the Governor-General-in-Council on 2nd May 1805. The time of ratification has been in a few cases specified as in the Treaty with Gwalior of 27th February 1804 where ratified counterpart is specified to be "delivered in the space of two months and two days."

The decision in *Walker vs. Baird*² is one of those cases from which it is difficult to educe any broad proposition. It can be cited for the position that acts done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between the Crown and Foreign powers, which affect private rights of British subjects are not acts of state and that their legality will be questioned by the Courts.

Ratification is complete only when "instruments containing the ratification of the respective parties have

¹ Sir W. Lee Warner. "*The Native States of India*" p. 49.

² 1892. A. C. 691.

been exchanged.”¹

What is the nature of the treaties between the Crown and the Indian States? Sirdar D. K. Sen states that these treaties are of a personal character. This is not correct. A popular writer has indulged in an erroneous generalization that “these forty treaties are no treaties at all. They are called so only by courtesy. These so-called treaties have no legal sanction behind them.”² They have been solemnly gone into by parties who had the power to contract into them. The respective legal status of typical states at the time when they came into treaty relationship with the Honourable Company has been examined. A study of these treaties with forty states reinforces the valuable lesson that in each treaty, the powers of the plenipotentiary have been expressed by phrases as “who have each communicated to the other their full powers.” (Preamble to the Treaty of 30th December 1803 with Scindia), “duly invested with full power and authority (Preamble to the Treaty of Mandasor with Holkar 1818); or if the Ruler of the State be present, the terms in the treaty run as “Maharaja Gulab Singh *in person*.” (Preamble to Treaty of Amritsar 1846). To set this puerile contention of Mr. D. V. Gundappa at rest, advertence has only to be made to the observation of the Court of Chancery in the *Nabob of the Carnatic vs. East India Company*³ where it has been held that the treaty between the two parties

¹ Art. on “*Do Treaties need ratification*” B. Y. I. L. 1934, pp. 113-137.

² Article in the *Hindu*, Madras, dated September 8, 1940.

³ 2 Ves. 57 at 60. Vide also *East India Company vs. Syed Ally*, 7 M. I. A. 555.

“was the same as if it was a treaty between two Sovereigns.” Thus it is totally untrue historically and legally to state that these treaties are no “more than memoranda indicating the broad lines of policy upon which the two parties agreed to start their mutual relations years ago.”

Nor is it wholly correct to state that these treaties are to be “regarded as guides of political conduct rather than sources of legal rights.”¹ Treaties were made *on a basis of equality* till 1813. They were treaties of “perpetual honour, favour and alliance” (Treaty of 1766 with the Nizam); the Treaty of 4th July 1790 between the “allies, the Nizam, United East India Company, and the Peishwa” was an “offensive and defensive alliance”; the Treaty with the Nizam of 1800 was a “perpetual and general defensive alliance;” the Raja of Travancore has been described as a “faithful ally” in Treaties; (e.g. Art. I, Treaty of Mangalore, 1784), a treaty of “perpetual friendship and alliance” was concluded with Travancore in 1805. “True friendship and good understanding” constitute the basis of the agreement with the Gaekwar, “in pursuance of which the Company will grant the Chief” “countenance and protection in all his public concerns” (Art. V. of the Articles of Agreement dated 6th June 1802); a consolidating definitive treaty “of defensive alliance” was concluded in 1805 between the Gaekwar and the British Government in India. The Treaty of Sarji Anjangaon of 1803 with the Scindia provides for the residing of “*accredited ministers from each at the Court of the other*” in order “to secure and improve the relations of amity and peace hereby estab-

¹ N. D. Varadachariar. *Indian States in the Federation*, pp. 20-21.

lished between the Governments.” (Art. XIV of the Treaty of Sarji Arjangaon).

Again, the Treaty of 1804 with the Scindia was one of “mutual defence” (Art. III). A treaty of “Friendship and Defensive Alliance” was concluded with Orchha in 1812. Nowhere else is the transition from the stage of alliance *inter pares* of the period prior to 1813 made so clear as in the two engagements with Alwar of 14th November 1803 and 16th July 1811. The Treaty of 1803 was one of “permanent friendship” with certain links loose in the chain. (Art. I). The Honourable Company “shall not interfere with the country of Maharao Raja nor shall demand any tribute from him.” (Art. III). Art. V in its ambit laid down the agreement of the Ruler to submit his disputes “with any other Chieftain to the Company’s Government” in return for the “guarantee of external security” given by the Honourable Company. Alwar’s interference in Jaipur in 1811, indicated the lacuna in the Treaty of 1803 of no express prohibition of political intercourse with other States without the approval of the British Government. It was thus found expedient on 16th July 1811 to bring into existence another engagement whereunder the Maharao Raja engaged for “himself and his heirs and successors that he (would) never enter into any engagements or negotiation whatever with any other State or chief without the knowledge and consent of the British Government.”

Further, the Treaty with Orchha of 23rd December, 1812 is one of “Friendship and Defensive Alliance” with one of the Chiefs of Bundelcund by whom and his ancestors his present possessions have been held in succes-

sive generations" (Preamble Art. I and II). An exactly identical description occurs in the "Treaty of Friendship and Defensive alliance" with Rewa of 5th October 1812. (Art. I). In Art. III of the Treaty the Raja is stated to be "the acknowledged *Sovereign* of his own dominions." The treaty with Bharatpur of 29th September 1803 is a treaty "of perpetual friendship" whereunder "the friends and enemies of either State shall be the friends and enemies of both (Art. II)."

From 1813 onwards the steps taken in treaties and grants were to exclude the prince dealt with, from "having any connection or engagement with other Chiefs or States, and even to make the sanction of the British Government necessary for his having any communication with them, sometimes but not always with the exception of amicable correspondence between friends and relations."¹ This transformed the protectorate into one in which England became the sole representative of the Indian State in all external intercourse. These new treaties bound the Rulers to "act in subordinate co-operation with the British Government;" in some cases, they were to be guided "in all matters by the advice of the British Agent." In Art. XIII of the Treaty of Mandasor (1818), "Mulhar Rao Holkar (engaged) never to entertain in his service Europeans or Americans of any description without the knowledge and consent of the British Government." Further, the Maharaja also agreed "not to send or receive Vakeels from any other State or to have communication with any other State except with the knowledge and consent of the British

¹ Westlake. "*Collected Papers*," pp. 208-209.

Resident.” (Art. IX). Again under the Treaty with Bhopal (26th February 1818) the Nawab and his heirs and successors were to “act in subordinate co-operation with the British Government and acknowledge its supremacy” and not “to have any connection with other Chiefs and States.” (Art. III).

British influence and protection were extended over the States of Rajputana on a basis of external protection and internal independence. In the Treaty with the Maharana of 15th January 1818, the Maharana was to “act in subordinate co-operation with the British Government and acknowledge its supremacy” and not “to have any connexion with other Chiefs or States” (Art. III). Under Art. IX of the same treaty, the “Maharana of Oudeypore shall always be absolute ruler of his own country and the British Jurisdiction shall not be introduced into that principality.” In the Treaties with Karauli, (9th November 1817) through Art. III with Kotah (26th December 1817, Art. III, IV and X) with Jodhpur, (6th January 1818, Art. III and IX), with Bundi (10th February 1818, Art. III, which combines as in Karauli the subordinate co-operation and internal autonomy” clauses) with Bikaner (9th March 1818, Art. III and IX), with Kishengarh (26th March 1818, Art. III and VII), Jaipur (2nd April 1818, Art. III and VIII) with Banswara (16th September 1818, Art. III and IV), with Partabgarh (5th October 1818, Art. I, V, VIII and IX,—the form of this treaty is slightly different there being more than five articles whereunder the British Government agreed to help the Rajah to the extent of “aiding him in enforcing all his just demands on his subjects,” Art. IX)—and with Dungarpur (11th

December 1818, Art. III and IV).

In the later treaty with Sirohi (31st October 1823) Article II deals with acknowledgement of "supremacy of the British Government." In the exceptional circumstances of internal trouble owing to misrule, the Regent Sheo Singh while craving for British protection bound himself "at all times" to "attend to the advice of the officer of the British Government." (Art. IV).

Till 1905 when the period of '*Cordial Co-operation*' with Indian States began crystallizing in the inauguration of the Chamber of Princes in 1921, Rulers of Indian States except to the extent of "usual amicable correspondence with friends and relations," (Art. IV of Treaty of 1818 with Udaipur) were prohibited from political intercourse with each other.

According to Prof. Hall, these treaties "really amount to little more than statements of limitations which the Imperial Government except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English Sovereignty in India have greatly changed since these were concluded and the modifications of their effect which the changed conditions have rendered necessary are thoroughly well understood and acknowledged."¹ A treaty has to be examined in the circumstances when it was contracted. While the latter part of Prof. Hall's statement refers to subsequent changes leading to the Paramount position of the British Government in India, the statement is of value in its unambiguous declaration that "it was not the original

¹ Hall. *International Law*. VI. Ed. p. 27. (Footnote).

intention of many of the treaties." An examination of the preamble to the treaties with Hyderabad, Baroda, Gwalior, Jammu and Kashmir as also a study of the clauses of the treaties of Rajputana dealing with "external control" and "internal autonomy" reinforce the point that they were made on terms of *equality*, and *amity for mutual defence*. The treaties with Rajputana States were contracted after the suppression of the Pindarees. An official commentary of 1853 made in return to an Order of the House of Lords, dated 16th June 1853 correctly describes the background of Rajputana treaties thus:—"The Chiefs were invited to ally themselves with the British Government on the basis of acknowledging its supremacy and paying a certain tribute, in return for external protection and internal independence."¹

These treaties of "amity," "perpetual and general defensive alliance," "perpetual and friendly alliance," "general defensive alliance," "friendship and defensive alliance" are in form comparable to the type of treaties which predominated until the Congress of Vienna in Europe. They were generally treaties of peace, alliance, friendship, neutrality, guarantee, commerce etc. These in one broad classification, can be distinguished from the modern multi-lateral treaties concluded during "the last half century and more particularly since the Great War (1914-18)."² Dr. Lauterpacht has pointed out that

¹ *Copies of Treaties and Engagements*, 24th June 1853, published by authority, p. 425.

² "British Year Book of International Law," 1930. Special Article on "*Functions and Differing Legal Character of Treaties*." Dr. A. D. McNair, p. 106.

the distinction between Treaties whose juridical character is that of contract and law-making treaties was visualized in international law by Bergbolm (in 1877) and Triepel (in 1899).¹

While at this point, it falls to examine the classification of treaties in general made by Dr. A. D. McNair, a foremost authority on International Law in the English-speaking world. Such a classification is found necessary to make easier the task of deciding disputes arising out of treaties. The greatly differing legal character of the several kinds of treaties requires framing of rules of interpretation "appropriate to the character of each kind."²

The following kinds of treaties emerge in Dr. McNair's classification:—

I. Treaties having the character of *Conveyances*, whereby "one state creates in favour of another or transfers to another or recognizes another's ownership of real rights, rights in *rem*, for instance, treaties of cession including exchange, e.g., Treaty of 1783 between Great Britain and the new U. S. A. The *Instrument of Transfer* of 1881, whereunder the Maharajah of Mysore "shall be placed in possession of the territories of Mysore" has the character of a Conveyance. The Sanad of 30th January 1899 given to Jhalawar after the territory passed to the Crown is another instance of a Conveyance. A State recreated by the prerogative of the Crown as Benares which was reconstituted into a State by the Instrument of Transfer dated 1st April 1911 is yet another example.

¹ Lauterpacht. *Private Law Sources and Analogies of International Law*, § 70.

² B. Y. I. L. 1930, p. 118.

II. Treaties having the essential juridical character of a *Contract*. These embody "bargains between the parties regulating their future conduct or confer mutual rights of trading or fishing for their respective subjects." "Exterritoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature" also come under this kind. Most of the treaties with Indian states are of this kind. In the Parliamentary Debates these treaties have also been described likewise:—"Years ago contracts were made individually with all the Princes and the principal points of the contract were, first, that the British Government should secure the safety of their frontiers and there should be no more wars for the Princes and second, that the British Government shall secure the legal succession of their heirs."¹

III. *Law-making* treaties can be divided further into treaties creating constitutional International Law (e.g., Covenant of the League of Nations, Statute of the Permanent Court of International Justice) and pure law-making treaties as Declarations of Paris, (1856), Conventions of the International Labour Organization.

IV. Treaties akin to Charters of incorporation. (e.g., The Universal Postal Union, 1874).

The nearest correct analogy to the rights and obligations under the treaties with the Princes is furnished by "covenants running with the land or praedial servitudes."² (Per Sir P. S. Sivaswamy Iyer).

The general principles governing praedial servi-

¹ Dated February 8, 1935.

² One nation or Sovereign can grant several privileges in his territories to another nation and Vattel cites the rights granted by "Several Sovereigns in the Indies". (Vattel Liv. 2 Ch. 7, § 89).

tudes were well developed in Rome. The right secured in a praedial servitude must be an advantage to the ruling estate not to its owner merely.¹ Covenants running with the land play an important part in English law. It is often a difficult question "whether or not a Covenant is so connected with the land as to run with it, viz., bind each successive assignee of land."² The common law rules and the equitable gloss developed by a long line of cases are discussed by Prof. Maitland in his "*Lectures on Equity*."³ Lord Birkenhead's "*Law of Property Act* (1922) (12 and 13 Geo. V. C. 16) puts it thus consolidating common law and equity:—A Covenant runs with the land when the benefit or burden of it, whether at law or in equity passes to the successors-in-title or the covenantee or the covenantor as the case may be." (§ 96 (4).)

Just applying this analogy, "the benefit or burden" of the treaties passes to the "successors-in-title," who are the Rulers recognized as such by the Paramount Power. If these treaties are taken to be personal in character, it unhappily cuts juristically at the very root of title of the present Rulers the enhancement of whose status is so dear to an eminent writer like Sirdar D. K. Sen.

Till 1832, Persian had been the diplomatic language when Lord William Bentinck substituted for it English. Maharajah Ranjit Singh as also the Jaipur Durbar preferred English as the medium of correspondence with

¹ Buckland: *Text-book of Roman Law*, I. Ed. pp. 259-260.

² Digby: *History of the Law of Real Property*, V. Ed. p. 415.

³ pp. 163-170.

the Governor-General as they wished the Governor-General to have a correct representation of their views and not an exaggerated and hackneyed hyperbole which was conveyed by Persian Correspondence.¹

On Sanads

The relationship with many states is through *Sanads*; and with a good many petty chieftains the *nexus* with the Paramount Power is through fealty-bonds or other engagements.

The word *Sanad* (in older documents it is found spelt *Sunnad*) has been translated in a dictionary "as the seal or signature of a judge. A royal ordinance, mandate or decree. A patent, grant, document, warrant, any royal deed of appointment under which another acts. An order, a written authority for holding either land or office."²

In the *Ain-i-Akbari*, every written statement of accounts is called a *Sanad*. The *Sanad* is described as the "voucher which relieves the Treasurer of all responsibility and on which people receive payment of their claims".....Some *Sanads* were "merely sealed with the imperial seal. Other *Sanads* were first signed and sealed by the ministers of state and were afterwards laid before His Majesty for signature. Many *Sanads*, however, were only signed and sealed by the grandees of the Court."³

¹ Minutes of Evidence of Select Committee, 1853.

Evidence of Sir C. Trevelyan, dated 21st June 1853.

² Johnson *Dictionary of Persian Arabic and English*, p. 717.

³ *Ain-i-Akbari*, Book II. (pp. 259-260). Translated by H. Blochmann, (1873).

A *Sanad* has been defined by Sir W. Lee Warner as a "diploma, patent, or deed of Grant by a Sovereign of an office, privilege or right."¹ This is not a correct definition, for as D. K. Sen² points out, the term has been used in the official Urdu version of a security bond, in the Indian Civil Procedure Code as a synonym for documentary evidence. Whether a *Sanad* is a grant or not depends entirely on its contents. Sirdar Sen cites very properly the Adoption *Sanads* of 1862 which only *acknowledged* what already existed in Law confirmed by immemorial custom. Sir W. Lee Warner was here again incorrect when he stated that Adoption Sanads conferred a right. *Sanad* has been correctly defined by Sirdar Sen as "a document of title embodying a clear and distinct statement or a formal expression of the terms of an agreement."

Analysis

These treaties, engagements, and *Sanads* can be classified under the following heads:—

I. Treaties, Engagements and *Sanads* of mutual amity and defensive alliance which had primarily linked these States with the British Government.

II. Agreements between the British Government and the Indian States for exchange, cession, and gift of territories.

III. Arrangements under the signature or guarantee of the British Government between the States and their feudatories.

¹ Lee Warner, "*The Native States of India*," p. 38.

Also A. P. Nicholson, "*Scraps of Paper*," p. 330.

² D. K. Sen, *Indian States*, pp. 2 to 4.

IV. Agreements for cession of territory and Jurisdiction for purposes of Railways.

V. Adoption Sanads.

VI. The Extradition Treaties.

VII. Engagements for Opium.

VIII. Agreements for Salt.

IX. Arrangements for exchange of postal correspondence, Telegraph Lines and Telephone connections.

X. Agreements regarding Imperial Service troops.

XI. Trade Agreements.

XII. Agreements regarding mint and coinage. Minority Rules of 1917.

XIII. Agreements regarding Cantonments.

XIV. Port Conventions.

XV. Other miscellaneous agreements. The Periyar Lease: 1886, e.g., Engagement of Sandur to cede lands for a sanatorium at Ramandrug: 1847. Sikkim's grant of Darjeeling (1835); Engagements regarding construction of canals. Agreements for leasing of forests. Agreements regarding waterways (Chamba—1864, 1872, 1873).

XVI. Berar Agreements.

XVII. Royal Proclamations and Assurances.

I. TREATIES OF AMITY, PERPETUAL ALLIANCE, AND DEFENSIVE ALLIANCE

These basic treaties deal with territorial integrity and protection of the States, prohibition of external intercourse and mutual aggression as between Indian States *inter se*, assurance of internal Sovereignty and the right of the British Government to advise in certain

circumstances, and provisions regarding tributes if any.

(a) *Territorial Integrity and Protection Clauses*

The following illustrative clauses from treaties substantiate how the British Government had assured the Rulers that their territories would be protected. Art. III of the Treaty with Alwar (1803) stated that "the Honourable Company shall not interfere with the country of Maha Rao Rajah nor shall demand any tribute from him." The Treaty with Gwalior (1804) is in substance a 'mutual defence' alliance. Thus Art. II provides for concerting and prosecuting further measures in cases of aggression against either. Art. VI lays down that the subsidiary force will "at all times, be ready, on the requisition of the Maharajah, to execute services of importance, such as the care of the person of the Maharajah, his heirs and successors, the protection of the country from attack and invasion, the overawing and chastisement of rebels or excitors of disturbance in the Maharajah's dominions, but it is not to be employed on trifling occasions."

Art. II and IX of the "definitive treaty of general defensive alliance (1805)" with the Gaekwar contain clauses for mutual defensive purposes. By this time the usual clause of the subsidiary force was evolved:—"The subsidiary force will at all times be ready to execute services of importance, such as the protection of the person of Anand Rao Gaikwar Sena Khas Kheyl Shumsher Bahadur, his heirs and successors, the overawing and chastisement of rebels and excitors of disturbance in his territories and the due correction of his subjects or dependants who may withhold the payment of

the Sircar's just claim; but it is not to be employed on trifling occasions nor like *sebandy*, to be stationed in the country to collect revenue.

Art. I of the Treaty of "perpetual friendship and alliance" with Travancore (1805) lays down that "the friends and enemies of either of the contracting parties shall be considered as the friends and enemies of both; the Honourable Company especially engaging to defend and protect the territories of the Rajah of Travancore against all enemies whatsoever."

Art. V of the Treaty with Bharatpur (1805) runs as follows:—"The country which was formerly in the possession of the Maharajah Runjeet Singh.....is now confirmed to him by the Honourable Company, and the Honourable Company in consideration of the friendship now established, will not interfere in the possession of this country, nor demand any tribute on account of it."

Art. I of the "Treaty of perpetual friendship and subsidy" with Cochin (1809) repeats the familiar clause "The friends and enemies of either of the contracting parties shall be considered as the friends and enemies of both, the Honourable the East India Company Bahadur engaging to defend and protect the territories of the Raja of Cochin against all enemies whomsoever." "Defence and protection of the Cochin territories against foreign invasion" are found in Art. III as well.

Art. II of the 'Treaty of Friendship and Defensive Alliance' with Orchha (1812) states the guarantee of protection thus:—"The territory which from ancient times has descended to Raja Bahadur by inheritance, and is now in his possession, is hereby guaranteed to the said Rajah and to his heirs and successors and they shall

never be molested in the enjoyment of the said territory by the British Government nor any of its allies or dependants, nor shall any tribute be demanded from him or them. The British Government, moreover engages to protect and defend the dominions at present in Rajah.....Bahadur's possessions from any foreign power."

Under Art. I of "the Treaty of Friendship and Defensive Alliance" with Rewa (1812), "the British Government engages to protect and defend the Dominions at present in the Rajah's possessions from the aggressions of any foreign power in the same manner as the Dominions of the Honourable Company are protected and defended."

In the Treaty of Mandasor (1818) with Indore, under Art. I, "the British Government will at all times extend the same protection to the territories of Maharajah.....Holkar as to his own."

In the treaties with Rajputana States of 1818 the article runs as follows:—"The British Government engages to protect the principality and territory....." (Art. II Treaty with Jodhpur; Art. II Treaty with Udaipur; Art. II Treaty with Doongarpore; Art. II Treaty with Bikaner; Art. II Treaty with Boondce; Art. II Treaty with Jaipur; Art. II Treaty with Banswara; Art. II Treaty with Jaipur; Art. II of the Treaty with Bhopal. Art. III of the Treaty with Jaisalmer (1818) reads a bit differently; "In the event of any serious invasion directed towards the overthrow of the principality of Jessulmer or other danger of great magnitude occurring to that principality, the British Government will exert its power for the protection of the principality, provided that the cause of the quarrel be not ascribable to the Rajah of Jessulmer."

Under Art. III of the Treaty with Dhar (1819), the British Government agreed "to protect the State of Dhar and its dependencies." Art. IX of the Treaty of Amritsar with Jammu and Kashmir (1846) states that the "British Government will give its aid to Maharajah Golab Singh in protecting his territories from external enemies."

The Instrument of Transfer of 1881 to Mysore states in Clause I that "the Maharaja shall.....be placed in possession of the territories of Mysore.....and installed in the administration thereof."

In the case of reconstitution of a new State, many stringent conditions were imposed as when the chiefship of Jhalawar was reconstituted in 1899. The last paragraph of the Sanad dated 30th January 1899 gave the assurance to the Ruler thus: "Be assured that so long as your house is loyal to the Crown and faithful to the conditions of the *Sanad*, (the Raja Rana of Jhalawar and his) successors will enjoy the favour and protection of the British Government."

In the '*Summud* to Rajah Kurrum Sing of Putteala' for Pergunnahs Maheelee etc. (1815), the British Government gave the assurance, that it "will always protect and support the said Rajah and his heirs in the possession of this territory."

(b) *Prohibition of External Intercourse and Mutual Aggression*

Clauses in treaties whereunder control of external affairs has been taken away and aggression between States *inter se* has been prohibited have been understood alike

by protagonists of the Princes and champions of rights of state-subjects.

Art. XV of the Treaty of 'perpetual, and general defensive alliance' with Hyderabad (1800) runs as hereunder:—"As by the present treaty the union and friendship of the two states are so firmly cemented that they may be considered as one and the same, His Highness the Nizam engages neither to commence nor to pursue in future any negotiations with any other power whatever without giving previous notice and entering into mutual consultation with the Hon'ble East India Company's Government."

Art. V of the Treaty with Alwar (1803) runs thus:—"As from the friendship established.....the Honourable Company becomes guarantee to Maha Rao Raja for the security of his country against external enemies, Maha Rao Raja hereby agrees that if any misunderstanding should arise between him and the Circar of any other Chieftain, Maha Rao Rajah will, in the first instance, submit the cause of dispute to the Company's Government, that the Government may endeavour to settle it amicably" Under Art II of the same treaty "the friends and enemies of the Honourable Company shall be considered the friends and enemies of Maha Rao Rajah and the friends and enemies of Maha Rao Rajah shall be the friends and enemies of the Honourable Company." Alwar's interference in 1811 in Jaipur affairs led to the filling up of the gap in the Treaty of 1803 through an engagement on the part of the Ruler on 16th July 1811 whereunder the Maharaja engaged "for himself and his heirs and successors, that he will never enter into any engagements or negotiation whatever with any other state or chief with-

out the knowledge and consent of the British Government.”

Art. I of the Treaty of “mutual defence” with Gwalior (1804) repeats the clause that “the friends and enemies of either state shall be the friends and enemies of both, and their mutual interests shall henceforward be inseparable.”

These clauses provide for also consent of the British Government for entertaining in the service of the Indian State “any European or American or any native of India, subject of the Honourable Company.” (Art. IX Treaty with Baroda, 1805).

Art. I, Art. VII and Art. VIII of the Treaty with Travancore (1805) are relevant under this head. Art. VII goes into further detail regarding the complete control of external correspondence. The Raja will “carefully abstain from any interference in the affairs of any State in alliance with theEnglish Company Bahadoor or of any State whatever and for securing the object of this stipulation it is further stipulated and agreed that no communication or correspondence with any foreign State whatever shall be holden by His Said Highness without the previous knowledge and sanction of the said English Company Bahadoor.” Further Art. VIII reads singular in its detailed obligation:—“His Highness stipulates and agrees that he will not admit any European foreigners into his service without the consent of the English Company Bahadoor; and that he will apprehend and deliver to the Company’s Government all Europeans of whatever description, who shall be found within the territories of His Said Highness without regular passports from the English Government; it being

His Highness' determined resolution not to suffer even for a day any European to remain within his territories unless by Consent of the Said Company."

Article II of the Treaty with Bharatpur (1805) repeats:—"as friendship has been established between the two States the friends and enemies of one of the parties shall be considered the friends and enemies of both, and an adherence to this condition shall be constantly observed by both States." Under Art. VIII of the same treaty the Maharaja "shall not in future entertain in his service, nor give admission to any English or French subjects or any other person from among the inhabitants of Europe, without the sanction of the Honourable Company's Government; and the Honourable Company also agrees not to give admission to any of the Maharaja's relations or servants without his consent."

Art. I of the Treaty with Cochin (1809) repeats the usual clause about the "friends and enemies of either" being considered as the "friends and enemies of both."

Art. VI and VII are replicas of Art. VII and VIII of the Travancore Treaty of 1805 extracted above. Art. I, IV, V, VI, and VII of the Treaty with Orchha (1812) are relevant under this head. Besides the usual reciprocal assertion regarding friends and enemies (Art I) provision against mutual "aggression" among Indian States is found elaborated in Art. IV. Art. VII goes farther than the similar clauses in other treaties in that the Rajah engages never to entertain in his service any British subject or Europeans of *any nation or description* whatever without the consent of the British Government."

In the Second Treaty with Rewa (1813) under Art. II the Raja of Rewah.....bound himself "to engage in no

correspondence of a political nature with any Foreign State or Chief whatever without the privity and consent of the British Government or its representative the Agent in Bundelcund." Art. IV of the Treaty with Rewa (1812) contains the clause against mutual aggression and engagement "to refer the case to the arbitration and decision" of the British Government.

In the Treaty with Indore (1818) Art. IX contains the clause prohibiting mutual aggression; under Art XIII Mulhar Raw Holkar engaged "never to entertain in his service Europeans or Americans of any description without the knowledge and consent of the British Government."

In the Treaty with States in Rajputana the relevant clause runs as follows:—"There shall be perpetual friendship, alliance and unity of interests between the Honourable English East India Company and Maharajah..... and his heirs and successors; and the friends and enemies of one party shall be the friends and enemies of both." (Art. I Treaty with Jodhpur; Art. I Treaty with Udaipur; Art. I Treaty with Bikaner; Art. I Treaty with Jaipur Art. I Treaty with Kishengarh; Art. I Treaty with Dungarpur; Art. I Treaty with Boondie (1818). Art. I of the Treaty with Bhopal (1818) has also the identical clause.

Art. V, VI, and VII of the Treaty with Jammu and Kashmir (1846) deal with this obligation. The Maharaja "will refer to the arbitration of the British Government any disputes or questions that may arise between himself and the Government of Lahore or any other neighbouring State and will abide by the decision of the British Government" (Art. V). Art. VI deals with the

Maharaja's forces joining British troops "when employed within the hills or in the territories adjoining his possessions." Maharaja Golab Singh engaged "never to take or retain in his service any British subject, nor the subject of any European or American State, without the consent of the British Government." (Art. VII).

Under the *Sanad* of 1815 "in case of war, the Raja of Patiala, must on the requisition of the British authorities, furnish armed men and Begarees to join the detachment of British troops, which may be stationed for the protection of the hill country." The *Sanads* of 1847 and 1860, further detail the obligations of the Raja *vis-a-vis* "military roads," "camping grounds for British troops," "and construction and repair of roads."

(c) *Internal Sovereignty and Right to Advice of
British Government*

Prior to examining these clauses in treaties and *Sanads*, three types of treaties emerge on close examination of the clauses. There are States like Hyderabad, Gwalior, Jammu and Kashmir, Baroda, Indore, Bhopal, the Rajputana States, Orchha and the Phulkian States of the Punjab (Patiala, Jind, and Nabha) where internal Sovereignty has never been surrendered.

Secondly, there are States where certain rights of interference have been established by treaty. Mysore, Travancore, Cochin, Rewa, Kolhapur and the Sanad States of Bundelkhand, afford among others instances of this kind.

Thirdly, there are many petty States, estates, and Jagirs the sovereign control of which has been taken

over by "the transference of their vassalage from some other Indian Sovereign State which previously exercised or claimed dominion over them."¹ The Kathiawar Chiefs other than first class and Behar and Orissa Tributary and Vassal States, sufficiently illustrate this class.

Under Art. XV of the Treaty with *Hyderabad* (1800) "the Honourable Company's Government on their part declare that they have no manner of concern with any of His Highness' children, relations, subjects, or servants" with respect to whom His Highness is absolute."

Art. VIII of the Treaty with *Gwalior* (1804) is an instance of internal autonomy absolutely left intact owing to the prior sovereign status of Gwalior.

"The Honourable Company's Government on their part declare that they have no manner of concern with any of the Maharaja's relations, dependants, military chiefs or servants with respect to whom the Maharaja is absolute; and that they will on no occasion, ever afford encouragement, support or protection to any of the Maharaja's relations, dependants, military Chiefs or servants who may eventually act in opposition to the Maharaja's authority, but on the contrary, at the requisition of the Maharaja, they will aid and assist to punish and reduce all such offenders to obedience; and it is further agreed that no officer of the Honourable Company shall ever interfere in the internal affairs of the Maharaja's Government." In substance Art. X of Treaty with Indore (1818) runs to the same effect.

Under Art. V of the Articles of Agreement (1802)

¹ From the Foreword of Lord Olivier to K. M. Panikkar's Work on *Relations of Indian States with the Govt. of India*.

with *Baroda*, the Company agreed to "grant the Chief its countenance and protection in all his public concerns according to justice and as may appear to be for the good of the country, respecting which he is also to "listen to advice." It is significant that provision regarding "listening to advice" *is not repeated verbatim* in the treaty of 1805. The Treaty of 1805 is a 'consolidating' enactment; the prior stipulations of 1802 were confirmed no doubt through Art. I of the Treaty of 1805. But, the stage of interference in internal affairs of Baroda was *altered* through a letter from the Honourable Mountstuart Elphinstone, Governor of Bombay to H. H. Sayajee Rao Gaikwar dated 3rd April 1820:—

"All foreign affairs are to remain as hitherto under the exclusive management of the British Government.

With regard to internal affairs your Highness is to be unrestrained, provided you fulfil your engagements to the bankers, of which the British Government is guarantee. The Resident is, however, to be made acquainted with the plan of finance which Your Highness shall determine on at the commencement of each year. He is to have access to the accounts whenever he requires it, and is to be consulted before any new expenses are incurred.

The guarantees of the British Government to ministers and other individuals must be scrupulously observed.

Your Highness to choose your own minister, but to consult the British Government before you appoint him.

The identity of interests of the two States will render it necessary for the British Government to offer its advice whenever any emergency occurs, but it will not interpose in ordinary details, nor will its native agent take a

share *as formerly in the Gaikwar Government.*" (Italics author's).

A few illustrative clauses from treaties with Rajputana may here be cited:—

Art. III of the Treaty with Alwar (1803) assures that the "Honourable Company shall not interfere with the country of Maha Rao Rajah nor shall demand any tribute from him." Identical in terms are the following clauses:—Art. III of the Treaty with Bharatpur (1803), also Art. V of the Treaty with Bharatpur (1805) and Art. II of the Treaty with Orchha (1812).

The treaty with Jodhpur (1818) contains a clause slightly different in form:—"The Maharajah and his heirs and successors shall remain absolute rulers of their country and the Jurisdiction of the British Government shall not be introduced into that principality." (Art. IX). To like effect are the following clauses:—Art. IX Treaty with Udaipur (1818); Art. IV Treaty with Banswara (1818); Art. VIII Treaty with Partabgarh (1818); Art. VIII Treaty with Jaipur, (1818); Art. III Treaty with Bundi (1818); Art. III Treaty with Karauli (1817); Art. IX Treaty with Bikaner (1818); Art. IX Treaty with Bhopal (1818).

Except restrictions and prohibitions of external intercourse, the Treaty of Amritsar with Jammu and Kashmir (1846) recognizes the "independent possession" of the country with its dependencies in Maharaja Gulab Singh (Art. I). The non-mention of any clause preserving internal sovereignty puts the State the highest in status in this particular.

In the second group of States where rights of inter-

¹Aitchison, IV Ed., Vol. VIII, p. 80.

ference have been established by treaty, Mysore, Travancore, Cochin, Kolhapur and the *Sanad* States of Bundelkand stand out prominent.

Clause XXII of the Instrument of Transfer (1881) to Mysore reproduces Art. XIV of the Subsidiary Treaty with the Raja of Mysore (1799):—"His Highness..... hereby promises to pay at all times the utmost attention to such advice as the Company's government shall occasionally judge it necessary to offer to him, with a view to the economy of his finances, the better collection of his revenues, the administration of justice, the extension of commerce, the encouragement of trade, agriculture, and industry or any other objects connected with the advancement of His Highness' interests, the happiness of his people and the mutual welfare of both states." This really traverses all departments of internal administration.

The Instrument of Transfer of 1881 has been replaced with the sanction of His Majesty's Government by the Treaty of 26th November 1913 with Mysore, placing the relations of the British Government with the Ruler of Mysore on the proper footing. Art. XIX of this Treaty reproduces Clause XX of the Instrument of Transfer 1881 thus:—"No material change in the system of administration now in force shall be made without the consent of the Governor General-in-Council. But in place of the all-pervasive Clause XXII in the Instrument of Transfer, Art XXI of the Treaty of 1913 reads thus:

"While disclaiming any desire to interfere with the freedom of the Maharaja of Mysore in the internal administration of his State in matters not expressly provided

for herein, the Governor-General in Council reserves to himself the power of exercising intervention in case of necessity, by virtue of the general supremacy and paramount authority vested in him, and also the power of taking such precautionary or remedial action as circumstances may at any time appear to render necessary to provide adequately for the good government of the people of Mysore and for the security of British rights and interests within that State."

Art. IX of the Treaty with Travancore (1805) and Art. IX of the Treaty with Cochin (1809) reproduce exactly Art. XIV of the subsidiary treaty with Mysore (1799) which detail interference in all branches of internal administration.

In the Articles of Agreement which were made with the Rajah of Kolhapore after the violations made by the Raja of the treaty of 1826, the British Government deemed it "necessary to appoint a chief minister for the future management of the Rajah's Government. His Highness Chetterbutty Sahib (Chatrapathi).....engaged to be guided by his advice in all matters relating to the administration of his State, the British Government having the sole power of appointing or removing the said minister as they may see fit." (Vide also Art. I Revised Agreement, 20th October 1862). Art. X of the Treaty with Rewa (1812) contains the engagement of the Raja to "conform to the advice of the British Government in all matters connected with the interests and prosperity of the British Government."

The Ruler of Panna, a Bundelkhand Sanad State, had under the discretionary powers vested in him through the Sanad (1867) to report immediately the sen-

tence of death to the Agent to the Governor-General and await confirmation by the Agent.

In the *Sanad* States of Bundelkhand, "periodical reports shall be submitted by the Chief to the local British Police officer of all cases in which sentences of transportation or imprisonment for life are passed by him."

In the last class come the numerous petty States, estates, and Jagirs as the many Kathiawar Chiefs other than those of the first class—who also got full powers only in 1922—the Behar and Orissa Tributary and vassal states, the Simla Hill States and the States of Pudukotah, Banganapalli and Sandur in South India.

The petty states of Kathiawar and Gujerat numbering 286 are organized in groups called *Thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of civil, revenue and criminal jurisdiction.

The Orissa states have had *Sanads* issued in 1894, 1908, 1915 and 1937. The legality of these *Sanads* has been particularly questioned by Mayurbhanj as being infractions of her treaty-rights. Clause III of the *Sanads* of 1915 demands that the "ruler shall conform in all matters concerning the preservation of law and order, and the administration of justice generally, within the limits of (his) State, to the instructions issued from time to time for (his) guidance by the Lieutenant-Governor of Bihar and Orissa in council." Art. VIII of the same *Sanad* expects "compliance with the wishes" of any officer duly vested with authority in this behalf by the Lieutenant Governor of Bihar and Orissa in Council, "in all important matters of administration."

Under the new *Sanads* of 1937 the States in Orissa

were divided into three categories, A, B and C. Class A States "exercise full civil and criminal jurisdiction. (e.g., Clause 2 of the *Sanads* of Mayurbhanj and Keonjhar) except that persons sentenced to death shall be given every facility for submitting a petition for mercy to the Agent to the Governor-General, Eastern States." Class B States (as e.g., Hindol, Nilgiri, and Talcher) must submit sentences of death and life sentences for confirmation to the Agent to the Governor-General Eastern States. Class C States (e.g., Ranpur, and Tigiria) are required to submit all death and life sentences and sentences of imprisonment for a period exceeding seven years for confirmation to the Agent.

Clause II *Ikrarnamah* dated 29th October 1846 entered into by the Raja of Nalagarh (a Simla Hill State) recognizes the right of the subjects "to appeal to the local British Agent against oppression or injustice" and under Art III the Raja engaged himself "on pain of forfeiture of the grant, to pay implicit obedience to any advice or remonstrance which the British Agent may have occasion to offer on their behalf." In the *Sanad* of Bussahir (another Simla Hill State) dated 8th Feb. 1816 it is laid down that if the Raja neglects to show "submission and obedience to the British Authorities".....he "shall incur displeasure and will be deposed."

In the letter to the Tondiman of Pudukkottah (a Madras State) dated 7th March 1806, confirming the grant of Keelanelly to the Tondiman the express condition stated is "that the district shall not be alienated and that it shall revert to the Company upon satisfactory proof being given that the inhabitants labour under any oppressive system of management." In the *Sanads*

issued to the Jaghirdars of Sandoor (12th January 1841 and Bunganapully (dated 20th March 1849), the restrictions on Criminal Jurisdiction are identical and run thus:—
“In the administration of criminal justice within (his) Jaghite, (he) will abstain from the punishment of mutilating criminals, and will not sentence capitally or execute persons capitally convicted, without the sanction of Government previously obtained, but will refer all cases appearing to (him) to call for such punishment for the consideration and orders of the Governor-in-Council.”

The Jaghirdar, under the next paragraph of the *Sanad*, is held “answerable to the Honourable Company for the good government of (his) Jaghir.”

(d) *Provisions regarding Tributes, if any*

It has been found that 212 states make regular cash payments as tributes. Contributions imposed or negotiated by British Government are:—

(1) in acknowledgement of Suzerainty, including obligations to aid and protect on the one side and to give subordinate co-operation on the other;

(2) in commutation of obligations for the provision of a state ‘contingent force’ or other form of military assistance;

(3) for the maintenance of a British ‘Subsidiary force’;

(4) fixed on the creation or restoration of a state, or on a re-grant or increase of territory (including annual payments for grants of land on perpetual tenure or for equalization of the value of exchanged territory);

(5) for special or local purposes, such as the mainte-

nance of local corps, police, etc.

These exhaust the kinds of tributes "imposed or negotiated directly by British authority."¹

To the Second Category belong those "transferred by or inherited from previous *Suzerain* powers or overlords." Contributions were acquired by the conquest or lapse of the original recipient State or were acquired by treaty.

The French for the first time devised in 1751 "the plan of guaranteeing protection to an Indian Ruler by providing a "subsidiary" force the maintenance of which was financed by cash contributions or the cession or assignment of specified territories.....It came about that, as one State after another entered the British System of alliances, they were required to contribute money or to cede territory for the maintenance of troops officered and disciplined by the Company's military establishment."²

Initially it has to be noted that the classes of cash contributions mentioned above are not 'mutually exclusive.'

The Treaties with the Rajputana States in 1818 illustrate the first class. (Vide. Art. VI of Treaty with Udaipur, amended by arrangements of 1826 and 1846; Art. VI Treaty with Jaipur as amended by the Treaty of 1871). Tributes were herein fixed as a recognition of British overlordship and acceptance by the State of the obligation of Subordinate Co-operation. The following Articles of

¹ Report of the *Indian States Enquiry Committee*, 1932, Financial. p. 18 and Appendix III Schedules A and B to the Report. Also *the Government of India Act* (25 and 26 Geo. V. Ch. 42 § 147 (5)).

² *Davidson Committee Report*, pp. 10 and 11.

Treaties further illustrate this:—Art. VI of Treaty with Bundi (1818), Art. IV of the Treaty of 1791 with Cochin, Art. II of Treaty of 1799 with Mysore, and Treaty of 1807, fixation of total contribution of Rs. 35 lakhs a year in the Instrument of Transfer 1881, confirmed in the Treaty of 1913, reduced to Rs. 24½ lakhs from April 1928.

The following illustrative clauses may be given from treaties and engagements of cash contributions received in commutation of obligations for the provision of a State contingent force or other form of military assistance:—(Art. VI. Treaty with Bhopal 1818, converted into a cash contribution by the Supplementary Article of 1849; Art XI of the Treaty of 1818 with Indore, commutation into cash in 1841 and capitalized in 1865). Art. II of the Treaty with Cochin 1809; Art. III of the Treaty with Travancore 1795, and Art. III of the Treaty of 1805;—illustrate contribution for maintenance of a British Subsidiary force coming under third class.

Contributions fixed for creation or restoration of a State or on a regrant or increase of territory are illustrated by the following cases:—Jhalawar on its creation in 1838 and regrant in 1899 had to pay a tribute; Lawa was created as a separate Chiefship in 1867 out of Tonk and its present tribute was fixed in 1883; the several arrangements with Cutch in 1818, 1819, 1822 and 1911 in regard to the cession and later retrocession of Anjar to Cutch; the tribute imposed on Manipur as a condition of regrant in 1891 after the rebellion; Cl. VI of the Instrument of Transfer on reconstitution of Benares as a State in 1911 and the additional tribute under a Supplementary Instrument of Transfer of further territory in 1919.

Contributions for special or local purposes are illustrated by Art VIII of the Treaty with Jodhpur, (the Mina Corps), The Mewar Bhil Corps, in re. Udaipur, The Malwa Bhil Corps in re. Indore, Dhar etc., the Kolhapur Infantry under Art. IX of the Agreement of 1862 with Kolhapur; contribution for police in Kathiawar etc., given by Baroda under the Supplement to Art. VIII of the Treaty of 1817.

Contributions acquired subsequently by the British Government by conquest or lapse of the original recipient. Travancore, for instance, pays as equivalent of "*peshcush*" and "*nazrana*" agreed in 1764 to be paid to Nawab of Carnatic, which has lapsed to British Government.

Contributions acquired by the British Government through assignment from the original recipient can be illustrated from the old tributaries to Baroda, Gwalior, Indore and Dhar.

II. AGREEMENTS IN RE. EXCHANGE, CESSION OR GIFT OF TERRITORIES

Owing to the general policy of settlement of the country on entering Bundelkhand, the British Government leased parganas to chieftains through *Sanads* as long as these rulers "remained faithful to the several Articles of the *Ikrarnamah* taken from them." Char-khari had to pay cash contribution owing to the lease of the *pargana* of Chandla and taluqa of Bina in 1811 and 1809 respectively. Indore has to pay an annual payment on account of excess of land made over to Indore in territorial exchanges of 1861. The *Sunnud* of 1811 grant-

ing the district of Sheorajpur to Panna in perpetual lease, ran in this respect thus:—"The villages and lands enumerated (therein).....with all the rights and tenures and usages, revenues, lands or Sayer, together with forts and fortified places, are hereby granted to the said Rajah and his heirs, exempt from the payment of revenue in perpetuity. So long as the said Rajah.....and his heirs shall observe and adhere faithfully to the Articles of the Obligation of allegiance which he has delivered in to the British Government, no sort of molestation or resumption shall ever take place on the part of the British Government."

The regrant Sanads e.g., those of Jhalawar (in 1899) and Benares (1911) embody all the changes in political relationship till the date of issue. A few clauses from the *Sanad* of Jhalawar may here be extracted to exemplify this practice:—

Clause II "The Chiefship of the Jhalawar State, the right to administer the said state and the said title and Salute will be hereditary in (him) and will be continued to (his) lineal descendants by blood or adoption, according to the custom of Succession recognized in Rajputana, provided that in each case the succession is approved by the Government of India.

III. The administration of the said State shall be conducted subject to such degree of supervision and political control exercised in such manner, as the Governor General in Council may from time to time determine.

IV. An annual tribute of Rs. 30,000 in British Indian Currency shall be paid by (him) and (his) successors to the British Government on 1st April in each year on account of the twelve months then commencing.

V. Every process of any British Court, civil or criminal, in India shall be exercised in the Jhalawar State as if it were a process of a court in the said State.

VI. The coins of the Government of India shall be legal tender in the Jhalawar State in the cases in which payment made in such coins would, under the law for the time being in force, be legal tender in British India, and the State shall not undertake separate coinage.

VII. No salt shall be manufactured in the Jhalawar state, either overtly or under the guise of manufacturing salt-petre or saline products. No salt other than salt upon which duty has been levied by the British Government shall be imported into or consumed within the State. No tax, toll or due of any kind shall be levied on salt imported into or exported from the State.....

VIII. The Raj Rana of Jhalawar shall comply with the wishes of the Government of India in all matters connected with the suppression of illicit traffic in opium.

IX. No transit duty of any kind shall be levied within the state.

The permanence of the grant conveyed by this *Sanad* will depend upon the ready fulfilment by (him) and (his) successors of the conditions which will be communicated to (him) forthwith, and of all orders which may be given by the British Government in regard to the administration of (his) territories, the composition of the armed forces of the state, and any other matters in which the British Government may be pleased to intervene. Be assured that so long as (his) house is loyal to the Crown and faithful to the conditions of this *Sanad*, (he) and (his) successors will enjoy the favour and protection of the British Government."

The Raja of Garhwal died in 1859 without issue and the State lapsed to the British Government; but through a second *Sanad* dated 6th September 1859, the territory was conferred upon Bhowan Singh with this proviso:—

“Be it known that British subjects, both Natives and Europeans, shall have free access into the Rajah’s territories for commerce or otherwise, that they shall receive the same consideration and protection as the subjects of the Rajah; that the Government shall have power to make roads through the Garhwal territory, and that this grant has been made on condition of good behaviour and of service, military and political in time of danger and disturbance.”¹

Likewise the Instrument of Transfer dated 1st April 1911 creating the State of Benares out of the Family Domains of the Raja of Benares exemplifies the consolidation of results of prior political practice in the several clauses. Clause XIII includes the grant of land *inter alia* for telegraph, railways or “any other public purpose.” (a very wide phrase indeed.)

Even in a model state as Mysore, both in the Instrument of Transfer of 1881 (vide Cl. XX) and in the Treaty of 1913, the clause persists that “no material change in the system of administration now in force shall be made without the consent of the Governor-General-in-Council.” (Art. XIX of the Treaty of 1913).

¹ Aitchison. IV. Ed. Vol. I. p. 35.

III. ARRANGEMENTS UNDER THE GUARANTEE OF THE BRITISH GOVERNMENT OF RELATIONS BETWEEN INDIAN STATES AND THEIR FEUDATORIES

A few typical cases may herein be cited. The State of Baroda gives instructive examples. Four such guarantees of a "perpetual and hereditary character" remain alone to be examined.¹ (i) A *Sanad* granted to Shankerji Sundarji Desai dated 27th April 1801 under the signature of certain Arab Jamadars has been signed under the Guarantee of Major Walker, the Resident on 26th February 1803. (ii) One Mangal Sakhi Das received a Sanad from Major Walker on 7th January 1803. (iii) Subhanji Pol who got a Sanad for himself and his uncle a *Sanad* on 11th May 1803 by Anund Rao Gaekwar bearing the Guarantee of British Govt. had the Sanad cancelled and a fresh one was granted to Subhanji Pol only in 1814. This was superseded by a permanent arrangement in 1849 when a cash annual sum of Rs. 7193-12-0 was undertaken to be paid to the Pol family after the resumption of his three villages. (iv) Mancherji Khurshedji Desai was granted a Purwana by Govinda Rao Gaekwar on 11th October 1793. This was also renewed on 10th August 1801 in a letter from the Gaekwar to the Chief of Surat.

Two other arrangements where the rights enjoyed in Gaekwar's territory by Raolji of Mansa (11 June 1892) and the Dewan of Palanpur (21 October 1892) have been acquired by the Gaekwar have been made through the auspices of the Government of India.

¹ Cited in Aitchison. IV. Ed. Vol. VIII. p. 6. and declared so by Government of India in Despatch No. 372 Foreign Dept. dated 21st January 1856.

There are seven mediatized Chiefs in the Indore Residency. For maintaining the security of the Simrol Pass, Sir John Malcolm made a settlement with them in 1819. In 1858, the Durbar of Indore commuted the right to receive taxes on goods passing through it for a money payment. Similar settlements were made with Men, Dhaora Ganjari, Kayatha, Naulana, Sheogarh, and Bilanda. Sheogarh and Bilanda receive *tankhas* from Scindhia also.

The engagement was executed by Sewai Singh of Talooka Mooltan to Ram Chunder Rao Puar of Dhar on 14th December, 1818 to pay every year Rs. 18044 to the Dhar State under the mediation of Brigadier-Genl. Malcolm. On the same day, another *Kuboolyat* (Engagement) was given by Kachee Baroda to the Ruler of Dhar to pay every year Rs. 9459 under the Guarantee of Malcolm.

Ten guaranteed *Bhoomiahs* (alluvial proprietors) had similar engagements executed or *Sanads* issued under the guarantee and mediation of the British Government. Kali Baori, Rajgarh, Garhi, Kothide (descended from Garhi) Bharudpura, Chiktiafar (descended from Bharudpura), Jamia, Mota Barkhera, Chhota Barkhera and Nunkhera, had such guaranteed engagements.

IV. AGREEMENTS OF CESSION FOR TERRITORY AND JURISDICTION FOR PURPOSES OF RAILWAYS

In the interests of the whole of India, co-operation of the States became necessary. Indian States made free grants of land and ceded jurisdiction 'for railway purposes' "over the line and all matters connected with its construction, direction, and management" to the

Government of India, (e.g., Gwalior's Railway Loan Engagement: d. 19th November, 1872).

The correspondence that had passed between the Gaekwar and the Resident at Baroda is instructive. In reply to a letter from the Residency dated 12th May (No. 420) that a prior communication from the State was not free from "doubts and uncertainty," the State of Baroda replied in a letter to the Resident thus on 14th May, 1856¹:—"we shall cede the land required for the railway, and the full sovereignty of this land will rest exclusively with the Government of India for railway purposes".....

"Taking this into consideration," ran the next paragraph, "we write that this business (railway) should cause no loss to our revenues in the Customs etc., as stated in our *Yad* of 29th February, No. 232, and we beg to receive a reply to this effect."

The agreement between Baroda and the British Government appertaining to the cession of Criminal Jurisdiction over the Bhavnagar-Gondal Railway line ran to this effect. The Dewan Sir T. Madhava Rao wrote thus on 29th September 1879:—

"I hereby cede on behalf of the Baroda State to the Government of India, all the Criminal Jurisdiction possessed by the Baroda State in the lands of the Amreli division which have been permanently assigned and made over by that State for the Kathiawar State Railway, this cession of the Criminal Jurisdiction aforesaid being exercised by the Government of India for so long as the aforesaid lands may be required for that Railway and

¹ No. 460. Extracted in Aitchison. IV. Ed. Vol. VIII. p. 110.

being restored to the Baroda State when the lands are no longer needed for the Railway.

It is to be understood that the authorities exercising the Jurisdiction ceded as aforesaid will liberally afford to the Servants of the Baroda State all reasonable and practical facilities, in view of the prevention of crimes, the apprehension of criminals, the seizure of stolen property and in view generally to the maintenance and promotion of peace and order."

A fairly identical memorandum was signed in January 1880 in regard to the Cession of Jurisdiction over the lands of the Kari district, with a significant addition "short of Sovereignty rights."

The memorandum of Terms agreed upon between the British Government and Maharaja Holkar (1864) is significant:—

*Concessions made by
Holkar*

1. Holkar cedes free of any charge any lands required specially for the Railway, its work and stations, provided that no lands within Railway limits are taken up by any traders or rent-payers for the purpose of building shops and carrying on trade to the injury of the interests of the Dur-

*Concessions made by the
British Government*

1. The British Government agree to give up to Holkar all Darbar offenders who having taken refuge within Railway limits may be found within such limits; but if such persons shall have passed on and escaped into British territory, their surrender must depend

*Concessions made by
Holkar*

bar by withholding the payments of taxes by such parties on the ground of their residing within those limits. And provided also that all buildings such as godowns, *dharmasalas* etc., erected outside the Railway limits shall be regarded as under *Darbar* Jurisdiction.

2. Full Civil and Criminal Jurisdiction over the lands required for the Railway, its works and bridges rests entirely with the British Government.
3. Holkar remits all transit duty on the through traffic of the Railway.

*Concessions made by the
British Government*

on the circumstances of the case and the pleasure of the British Government.

2. Government will not hold the *Darbar* responsible for offences committed within Railway limits, unless those offences are traced to subjects of the *Darbar*.
3. Still retaining the right to exercise its discretion in particular cases, Government as a general rule will not object to deliver to Holkar for punishment *Darbar* subjects who may have been convicted and sentenced

*Concessions made by
Holkar**Concessions made by the
British Government*

by Government officers
for offences committed
within Railway limits.

This memorandum appears under the signature of the Under-Secretary to Government of India bearing date 10th January 1866.

That the cession of railway jurisdiction has been tardy and out of "deference to the wishes" of the Paramount Power is evident from the Gaekwar Correspondence of May 1856, the Holkar memorandum of 1864, the *Khureeta* of the Maharaja of Jodhpur of 19th July 1866 and the Nizam's Correspondence of September 1887.

The *Khureeta* from the Maharaja of Jodhpur dated 19th July, 1866 begins thus:—

I have had the pleasure to receive and understand your *Khureeta* of 19th February last to this effect that Government considers the stipulations contained in my former letter to amount to a virtual refusal by this Durbar to have a Railway. I wish you to know that I never wished to disapprove of the Railway; indeed I feel how many benefits it will confer on Marwar. What I first wrote regarding the loss of customs duties was founded on this that very little foreign goods are expended in Marwar, and that besides salt, there is no other export of importance produced in Marwar; therefore, the chief income of this State is derived from transit dues on articles which pass through it (i.e., without breaking bulk), and from the loss of this item my revenue will

certainly suffer heavily. Still in deference to your address to me, to the wishes of the British Government, and to the benefit of all my subjects, "I accede to the Railway passing through Marwar on.....conditions."

A typical railway engagement with the guaranteed chiefs is that with Jhabua dated 21st April 1864. The Ruler of Jhabua engaged as follows binding on his successors from generation to generation:—

I. "All such land as may be necessary for the railroad, workshops, buildings and bungalows etc., will be given gratis.

II. The British Government to exercise full sovereignty over such lands as may be given for the railroad and the buildings thereof.

III. Any manner of dispute arising between the people connected with the railway and the subjects of the Darbar to be decided before the Political Officer.

IV. All persons residing within the railway limits, whether subjects of the British Government or of the Durbar, to be under the Jurisdiction of the railway or Government officials.

V. Should any loss accrue to any person by the construction of the railway within the Darbar territory, either by the destruction of any building or the occupation of any land or by any other means within railway limits, the Darbar will be answerable for it.

VI. All through traffic by the rail will be free of duty, but goods arriving at the railway through the Darbar territory or leaving the railway within the Darbar territory will be liable for payment of duty to the Darbar."

The typical clauses found in the letters of agreement signed by the Kathiawar Chiefs in 1887 ran thus:—

"I.....beg to state that I agree to cede the full criminal and civil jurisdiction possessed by me over the lands taken up.....for the.....railway in my territory, including those occupied for stations and buildings and for other purposes connected with the said Railway to the British Government."

In the premier State of Hyderabad, the official letter vesting jurisdiction over Hyderabad Railways, emanated from the Nizam's minister to the Resident bearing date September 10, 1887:—"I beg to state that His Highness' government is willing to accede to the wishes of the Government of India regarding the Criminal and Civil Jurisdiction, as is the case on other lines running through independent States."

A construction of this cession of Jurisdiction fell to be made under the following circumstances by the Privy Council in *Muhammad Yusuf-ud-din vs. the Queen Empress*.¹ The question to be decided was whether the arrest of *Yusuf-ud-Din*, a subject of the Nizam's State, while he was at the station on a railway which was locally situated within the dominions of the Nizam, was lawfully executed by a warrant issued by a magistrate at Simla, in respect of an offence committed in British territory.

Lord Halsbury delivering the judgment, held that "the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority, therefore, to execute any criminal process must be derived in some way or another from the Sovereign of that territory, and the only authority relied on

¹ 24 I. A. (1896-97), p. 137.

here is the authority given in the Correspondence which constitutes the cession by the Nizam of Jurisdiction to the British Government.....Even if in more extensive terms than in fact are included in the notification it had purported to give jurisdiction, as the stream can rise no higher than its source, that notification can only give authority to the extent to which the Sovereign of the territory (the Nizam) has permitted the British Government to make that notification.”¹

The additional papers perused by the Privy Council refer to the letters of the Resident dated March 28, 1887, and the counterproposal made by the Nizam’s minister to pass by his own authority such British Indian laws “as are necessary for the ordinary administration of civil and criminal justice.” The Resident met these objections by pointing out that he had not asked for the cession of any territory and that the Nizam could hardly intend to assert “that the Grant of the means for carrying on a small piece of administration in a more legal and efficient mode than has hitherto been found possible be viewed as a commencement of annexation of large tracts in His Highness’ Dominions by the English Government.”

His Lordship found no evidence of any other jurisdiction in the case given by treaty or usage or otherwise, except through the concluding letter from the Nizam’s Minister:—“Civil and Criminal Jurisdiction along the line of railway as is the case on other lines running through independent States.” Their Lordships held that in the circumstances the arrest was illegal, since the act complained of was one which cannot in any sense be

¹ 24 I. A. at p. 145.

regarded as coming within the Jurisdiction "along the line of railway."¹

Since 1899, a new formula evolved by the Government of India probably as a result of the Privy Council decision, is found in agreements made with Indian States. A letter from the Resident at Jodhpur dated 5th September, 1899 regarding the Jodhpur-Bikaner Railway is extracted by an author which mentions the phrase "*full and exclusive power and Jurisdiction of every kind.*"² This change of phraseology clearly intended to acquire powers decided not to exist by the Privy Council in 1897, is found in the three agreements entered into by the Maharajas of Cochin and Travancore in 1899. The three are identical in terms and the earliest of these three agreements is dated 22nd August 1899 entered into by the Maharaja of Cochin in regard to the Cochin portion of the Shoranur-Cochin Railway:—

"I.....Raja of Cochin hereby cede to the British Government full and exclusive power and jurisdiction of every kind over the lands in the said State, which are or may hereafter be, occupied by the Shoranur-Cochin Railway (including all lands occupied for stations, for outbuildings and for other railway purposes), and over all persons, and things whatsoever within the said lands." This new formula is found repeated in the following arrangements for cession of Jurisdiction:—Agreements of the Maharaja of Travancore dated 17th October, 1899, and 21st November, 1899, Agreements of Gwalior of 1899 and 1906; Agreement of the Maharaja of Panna for

¹ This famous judgment of the Privy Council was dated July 7, 1897.

² A. P. Nicholson, "*Scraps of Paper,*" pp. 154, 155.

the Saugor-Katni Railway dated 6th July 1899; Agreement of the Nawab of Rampur in re. the Bareilly-Rampur-Moradabad Railway—dated 13th September, 1899, the two Agreements of 1899 and 1900 of Bikaner, and the Agreement of 1904 signed by Alwar, and the two Agreements of Cooch-Bihar dated 20th June 1899 and 26th February 1901. Nowhere is the change in terminology so patent as in the Agreements of Baroda signed in 1879 and 1880 on the one hand and those signed by Baroda on 13th October 1900, and 27th January 1903 on the other where the terms “full and exclusive power and jurisdiction” have been incorporated afresh.

With regard to Patiala, there is definite evidence that when the State was asked to subscribe to what Aitchison innocuously describes as the ‘revised form,’ there were a series of cogently argued replies against the change. When the Resident assigned “imperial reasons” followed by an instruction that the “Patiala Durbar should comply with the wishes of the Government in the matter,”¹ in the then isolation of Indian States, Patiala had to sign the revised forms of agreement regarding cession of jurisdiction in 1900 *vis-a-vis* the two railway lines—Rewari-Ferozepore Railway and Delhi-Amballa-Kalka Railway.² The sister States of Jind and Nabha had to fall in each signing three revised forms of agreement in 1900.³

¹ Letter from Secretary of the Punjab Govt. dated 5th April 1900.

² Aitchison, IV Ed. Vol. VIII. pp. 248 and 249.

³ Ibid. pp. 285, 286.

V. ADOPTION *Sanads*

The institution of adoption owes its origin to the hankering after sons which has been a characteristic feature of all "primitive Aryan Societies, due partly to their exigencies and partly to the advocacy of the spiritual value of a son by the priests."¹ Differing reasons for the institution of adoption are given by Mayne and the Privy Council.² Adoption has been in vogue in Hindu India from spiritual as well as secular motives.

The doctrine of 'lapse' which was applied by Lord Dalhousie had led to serious discontent and grave misgiving among the Indian Princes. Reassuring *Sanads* of adoption were issued by Lord Canning to 160 States in 1862. Lord Lansdowne issued 17 more in 1890.

A typical adoption *Sanad* issued to a Hindu Ruler ran thus:—

"Her Majesty being desirous that the Governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated and that the representation and dignity of their Houses should be continued, I hereby in fulfilment of this desire, convey to you the assurance, that on failure of lineal heirs, the adoption by yourself and future rulers of Your State of a successor, according to the rules and traditions of Your family, will be recognised and confirmed.

Be assured that nothing shall disturb the engagement thus made to You so long as Your House is loyal to the

¹ S. V. Iyer. "*Outlines of Hindu Law*," p. 116. Also Mayne, X Ed. pp. 195-199. Also *Amarendra's Case*, 60 I.A. 242, Vide also L. R. Tewari, *Leading Cases on Hindu-Law*, pp. 66-69.

² *Satrugna vs. Savitri*. 2 Knapp. 287.

Crown and faithful to the conditions of the Treaties, Grants or Engagements which record its obligations to the British Government" (11th March, 1862). (Sd.) Canning.

In the case of Musulman Rulers, the assurance ran as follows:—"I hereby, in fulfilment of this desire, convey to you the assurance that on failure of natural heirs, any succession to the government of Your State which may be legitimate according to Mahomedan Law will be upheld." 11th March, 1862. (Sd.) Canning.

VI. EXTRADITION TREATIES

The obligation to extradite foreign criminals is a type of duty which flows from the junction of the royal prerogative and Acts of Parliament. Extradition is "the surrender by one State to another of an individual who is found within the territory of the former and is accused of having committed a crime within the territory of the latter, is one of its subjects and as such by its law amenable to its Jurisdiction."¹ Extradition is a political question, the law governing it having been created by statute and treaty."² In *Besset's case*,³ Lord Denman said, "neither we nor the gaoler have any power but such as the statute gives."

With the sanction of Parliament, the Crown has agreed to surrender certain fugitive accused persons to Austria, Belgium, Brazil, Denmark, France, Germany and other nations. These treaties have been published

¹ Lawrence. *International Law*. VII. Ed. p. 236.

² Piggott. "*Extradition*." X. Ed. p. 1.

³ 6. Q. B. 481.

in the Gazette of India and if the accused finds shelter in an Indian State, that State is bound to surrender him to the British authorities without any express engagement in that behalf.

Sir W. Lee Warner, an eminent authority, states that the source of this obligation is "the connexion of the Native State with the British Government and its delegation to the Government of all rights of negotiation." Prof. Westlake would not use the term "delegation" but would stress on the absence of any "*persona standi*" towards the foreign State which should make negotiation by the Indian State possible."¹

Typical Extradition treaties with Hyderabad and States of Rajputana may here be examined:—

HYDERABAD

I

Extradition Treaty dated 8th May, 1867.

Art. I

The two Governments hereby agree to act upon a system of strict reciprocity, as hereinafter mentioned.

Art. II

Neither Government shall be bound in any case to surrender any person not being a subject of the Government making the requisition. If the person claimed should be of doubtful nationality, he shall with a view

¹ Westlake. "*Collected Papers.*," p. 629.

to promote the ends of Justice be surrendered to the Government making the requisition.

Art. III

Neither Government shall be bound to deliver up debtors, or civil offenders, or any person charged with any offence not specified in Art. 4th.

Art. IV

Subject to the above limitations, any person who shall be charged with having committed within the territories belonging to or administered by the Government making the requisition, any of the undermentioned offences, and who shall be found within the territories of the other, shall be surrendered; the offences are:—

1. Mutiny.
2. Rebellion.
3. Murder.
4. Attempting to Murder.
5. Rape.
6. Great Personal violence.
7. Maiming.
8. Dakaiti.
9. Thagi.
10. Robbery.
11. Burglary.
12. Knowingly receiving property obtained by dakaiti, robbery or burglary.
13. Thefts of property exceeding Rs. 100/- in value.

14. Cattle-stealing.
15. Breaking and entering a dwelling-house and stealing therein.
16. Setting fire to a village house or town.
17. Forgery or uttering forged documents.
18. Counter-feiting current coin.
19. Knowingly uttering base or counterfeit coin.
20. Embezzlement, whether by public officers or other persons.
21. Kidnapping.
22. Abduction.
23. Being an accessory to any of the above-mentioned offences.

Art. V

In no case shall either Government be bound to surrender any person accused of any offence except upon requisition duly made by or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality as, according to the laws of the country in which the person accused shall be found, would justify his apprehension and sustain the charge, if the offence had been there committed.

Art. VI

The above Treaty shall continue in force until either one or the other of the high contracting parties shall give notice to the other of its wish to terminate it and no longer.

Art. VII

All existing Engagements and Agreements shall continue in full force.

II

Agreement made between His Highness the Nizam and the Government of India, modifying the provisions of the treaty of 1867.

Whereas a treaty relating to the Extradition of offenders was concluded on the 25th May, 1867 between the British Govt. and the Hyderabad State; and whereas the procedure prescribed by the Treaty for the Extradition of offenders from British India to the Hyderabad State has been found by experience to be less simple and effective than the procedure prescribed by the law as to the Extradition of offenders in force in British India: it is hereby agreed between the British Govt. and the Hyderabad State that the provisions of the treaty prescribing a procedure for the Extradition of offenders shall no longer apply to cases of Extradition from British India to the Hyderabad State, but that the procedure prescribed by the law as to the Extradition of offenders for the time being in force in British India shall be followed in every such case.

Signed at Hyderabad, Deccan, on the twenty-first day of July one thousand eight hundred and eighty-seven.

An agreement consisting of Three Articles has been signed on 29th Nov. 1910 between the British Govt. and the Hyderabad State for the unrestricted Extradition

of offenders from Berar to British India and *vice versa*.

In the *Instrument of Transfer* to Mysore dated 1st March 1881, clause 16 runs thus:—

“The Maharaja of Mysore shall cause to be arrested and surrendered to the proper officers of the British Government any person within the said territories accused of having committed an offence in British India, for whose arrest and surrender a demand may be made by the British Resident in Mysore, or some other officer authorised by him in this behalf; and he shall afford every assistance for the trial of such persons by causing the attendance of witnesses required, and by such other persons as may be necessary.”

Cl. 15 of the Mysore Treaty of 1913 which is identical with the above clause contains the *extradition arrangement with Mysore*.

RAJPUTANA STATES

I

Ulwar (Alwar)

Extradition Treaty dated 12th October, 1867

Art. I

That any person, whether a British or a foreign subject, committing a heinous offence in British territory, and seeking shelter within the limits of the Ulwar State, shall be apprehended and delivered up by the latter Government to the former on requisition in the usual manner.

Art. II

That any person, being a subject of Ulwar, committing a heinous offence within the limits of the Ulwar state, and seeking asylum in British territory, will be apprehended and delivered up by the latter Government to the former on requisition in the usual manner.

Art. III

That any person, other than an Ulwar subject, committing a heinous offence within the limits of the Ulwar State, and seeking asylum in British territory, will be apprehended and the case investigated by such court as the British Government may direct. As a general rule, such cases will be tried by the Court of the Political Officer, in whom the political supervision of Ulwar may at the time be vested.

Art. IV

That in no case shall either Government be bound to surrender any person accused of a heinous offence, except upon requisition duly made by, or by the authority of, the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality as, according to the laws of the country in which the person accused shall be found, would justify his apprehension, and sustain the charge if the offence had been there committed.

Art. V

That the following offences be deemed as coming

within the category of heinous offences:—

1. Murder.
2. Attempt to murder.
3. Culpable homicide under aggravating circumstances.
4. Thuggee.
5. Poisoning.
6. Rape.
7. Causing grievous hurt.
8. Child-stealing.
9. Selling females.
10. Dacoity.
11. Robbery.
12. Burglary.
13. Cattle-theft.
14. Arson.
15. Forgery.
16. Counterfeiting coin or uttering base coin.
17. Criminal breach of trust.
18. Criminal misappropriation of property.
19. Abetting the above offences.

Art. VI

The expenses of any apprehension, detention or surrender made in virtue of the foregoing stipulations shall be borne and defrayed by the Government making the requisition.

Art. VII

The above treaty shall continue in force until either

of the High Contracting Parties shall give notice to the other of its wish to terminate it.

Art. VIII

Nothing herein contained shall be deemed to affect any Treaty now existing between the high contracting parties, except so far as any Treaty may be repugnant thereto.

PART II

Exactly similar treaties were entered into by the following States on the dates specified against each:—

- Banswara—24th Dec., 1868.
- Bharatpur—24th Dec., 1867.
- Bikaner—3rd February, 1869.
- Bundi—1st February, 1869.
- Dholpur—14th January, 1868.
- Dungarpur—7th March, 1869.
- Jaipur—13th July, 1868.
- Jaisalmere—10th March, 1870.
- Jhalawar—28th March, 1868.
- Jodhpur—6th August, 1868.
- Kasauli—27th November, 1868.
- Kishangarh—27th November, 1868.
- Kotah—6th February, 1869.
- Partabgarh—22nd November, 1868.
- Sirohi—9th October, 1867.
- Tonk—28th January, 1869.
- Udaipur—16th December, 1868.

PART III

Agreement supplementary to the Treaty of 1867 regarding Extradition—1887.

Whereas a Treaty relating to the Extradition of offenders was concluded on 29th October, 1867 between the British Government and the Ulwar State: and whereas the procedure prescribed by the treaty for the extradition of offenders from British India to the Ulwar State has been found by experience to be less simple and effective than the procedure prescribed by the law as to the extradition of offenders in force in British India: It is hereby agreed between the British Government and the Ulwar State that the provisions of the treaty prescribing a procedure for the extradition of offenders shall no longer apply to cases of extradition from British India to the Ulwar State; but that the procedure prescribed by the law as to the extradition of offenders for the time being in force in British India shall be followed in every such case.

Similar supplementary agreements have been entered into by all the States which had entered into treaty relationships in this behalf.¹

With reference to the Law of Extradition between the Paramount Power *vis-a-vis* the Indian States, Mr. K. M. Panikkar points out certain difficulties which deserve careful attention.

It was only after long correspondence that the Government agreed "that the extradition of persons other

¹ For *Extradition Treaties* between different countries. Vide Piggott. "*Extradition*," Appendix II.

than British subjects may be granted from railway lands for all cases of offences and not merely those enumerated in or specified by the Governor-General in Council under the Schedule of the Indian Extradition Act of 1903 as applied to those lands, for which alone the extradition of British subjects will usually be granted."

In this connection may be discussed the law relating to extradition from and to Indian States.

With many States there are extradition treaties which govern the surrender of criminals. A *prima facie* case has to be established and British India or the State concerned surrenders the criminal to the jurisdiction of the *delicto loci*. This may appear on the face of it to be an equitable arrangement, but in fact it is not so. It has been claimed that the *prima facie* evidence which British Indian authorities should submit is for the satisfaction not of the State but of the Political Officer. As Col. Newmarch, the Resident, wrote to the Gwalior State, "If I consider the *prima facie* evidence sufficient, that opinion should be enough to justify the extradition and trial of accused persons by a British Court."

A few of the other difficulties which have been experienced in regard to the existing extradition relation between the Indian States and the Government of India may also be mentioned here:—

1. The provisions of Sections 8 A and 15 of the Act XV of 1903 leave it entirely to the discretion of the local Governments, to decline to surrender offenders in spite of a warrant having been duly issued by the Political Agent.

2. Distinction is made for purposes of the surrender of deserters from Imperial Service Troops and the Military Forces of States.

3. The British Indian Government often demand surrender of persons accused of offences which they themselves do not treat as extraditable for purposes of surrender to Indian States.

Generally put, the actual position is that in regard to the Major States which have no treaty of extradition, arrangements are on the basis of reciprocity; but that principle is subject to the right claimed by the Government of India as Paramount Power to demand the surrender of any class of criminals and the right to refuse extradition in cases referred to in rules 3 and 5 of the extradition rules.

Case-Law

§§ 7 to 15 of the Indian Extradition Act 1903 (India Act XV of 1903) deal with the surrender of fugitive criminals in case of States other than foreign States—viz., Indian States. A few important decisions bearing on Indian States may here be examined.

Cases of extradition from Berar to the Hyderabad State, are governed by the Extradition Treaty of 1867 between the Indian Government and the State of Hyderabad and not by the Indian Extradition Act of 1903.¹

It has been held that the offence of cheating is an extradition offence so far as British India is concerned under Act XV of 1903 notwithstanding its omission from Art. IV of the Extradition Treaty of 1867 between the British Indian Government and the Hyderabad State.²

The responsibility for the legality of a warrant

¹ *Dadi Prasad vs. Dt. Magistrate. Yeotmal.* 77 I. C. 234.

² *In re Murlidhar Bhagwan Das,* 43 B. 310.

issued under §7 of the Indian Extradition Act rests "with the officer by whom it was issued and the Magistrate to whom it is addressed is not required to make any inquiries." Under §7 there are three conditions¹ precedent for the issue of a valid warrant:—(a) The offence must be an "extradition offence" viz., one of those given in the first Schedule of the Indian Extradition Act.

(b) The accused must not be a European British subject: and (c) the offence must have been committed or must be supposed to have been committed by the accused in the territories of the State. Without all these three conditions being fulfilled, the Political Agent would have no authority to issue a warrant for the arrest of any person who has either escaped into or is in British India and the arrest of such a person in pursuance of such a warrant would be clearly illegal.²

Rules have been made by the Governor-General in Council in virtue of powers conferred by the Indian (Foreign Jurisdiction) Order in Council 1902 and under §22 Indian Extradition Act (1903).³ Further rules have also been made in 1925.⁴

The policy of extradition law is to secure offenders guilty of only grave crimes and not purely local crimes or slight offences.⁵

In *In re C. P. Mathen*⁶ it has been held that it must be presumed that the Political Agent in Travancore

¹ *Hansraj vs. The Crown*, 7 L. 159.

² *Sandal Singh vs. Dt. Magistrate and Superintendent Debra Dun*, 56 A. 409 at 417.

³ Gazette of India, 1904, Part I, p. 364.

⁴ Gazette of India, 1925, Part I, p. 630.

⁵ *Venkatrangiengar vs. Govt. of Mysore*, 39 Mysore H. C. R. 485.

⁶ 1939 M. 128.

has complied with the rules before issuing the warrant. Under §6 of the Extradition Act the Chief Presidency Magistrate has no option but to execute the warrant. It was further held that the fact that the warrant issued by the Political Agent does not instruct the Magistrate in terms with regard to the particular frontier police station at which the prisoners should be delivered is not a matter of any importance. A special leave to appeal to the Privy Council against this judgment has been also dismissed by the Privy Council.

VII. ENGAGEMENTS FOR OPIUM

The policy of Opium restrictions followed by the Government of India tended to enrich the revenues of British India. Till 1907 the engagements gone into with Indian States penalized the opium grown in Indian States and favoured that of British India. Since 1907 export of opium to China has been reduced; the Indian States have been allowed a restricted cultivation of the poppy. The Government have also "excluded the States from the non-China market for opium."

The Dewan of Nawanagar, for instance, entered into an engagement on 11th January, 1821 to give publicity for the British Government notification. "If any one requires any opium for retail sale he will be furnished with a letter and sent to the Government Store to purchase it. If any one purchases any opium from any place other than the Government Store or if any one sells it or brings it from other countries, the fact shall be reported to Government immediately, and the opium appearing to be other than of the Government Store

drug shall be confiscated by Government; one-third of it shall be paid to the informer, and the remaining two-thirds to the talookdar within whose limits it was seized." Similar engagements were also executed during January and February, 1821 by Porbander, Dharangdhara, Than Lakhtar, and thirteen other taluqdars and zemindars.

These engagements were not fulfilled adequately and fresh rules on ground of 'Imperial interests' were laid down in 1878. The ruling was given by the Government of India in 1881 that the "British Government had always exercised the right of levying a duty on opium and that the prohibition to the cultivation and manufacture of opium was of long standing and had been acquiesced in by the States of Kathiawar and must continue."¹ Further rules were passed regarding the Kathiawar States in 1899.

VIII. SALT AGREEMENTS

The policy of taxing salt has been inherited by the British Government from the Moghul Empire. The methods adopted in establishing effective control over salt sources throughout India and the manner in which in certain states of Kathiawar and Cutch the settlement was arrived at have been correctly stated by the Davidson Committee. The method adopted was (i) "to acquire from the principal salt producing States such additional salt works as were required to meet the increased demand for the satisfaction of which the Government of India proposed to assume responsibility;

¹ Aitchison, IV Ed. Vol. VI, p. 86.

(ii) to organize the suppression of all other States' salt works and

(iii) to secure the elimination of transit duties upon salt."¹

As early as 1822 the Chief of Patri agreed to abandon his claim on the salt-pans in consideration of receiving cash payment. In 1824, the Thakur of Jhinjhuwara accepted similar engagements.

The engagement entered into by the Nawab of Radhanpur on 15th April, 1840 is typical of such engagements got in Kathiawar and Cutch after continued pressure. Relinquishment of "all right and concern" in the salt-pans to the Honourable Company, yearly compensation paid for "previous receipts from the pans and transit duties on salt," yearly supply of a quantity of salt for the use of the Darbar, compensation for prior charitable distribution,—these constituted salient points of agreements entered into "with about fifty States which owned or had an interest in salt works or were in a position to levy transit duties on an important scale".

Anterior to the general salt settlement of 1869, the following arrangements deserve mention. Through the arrangement of 1824, Jhinjhuwara receives Rs. 7788 p.a. as consideration for the sale of her right to manufacture salt to the East India Company. Palanpur receives 350½ maunds of duty free salt p.a. for her surrender of manufacturing rights. Patdi share in the manufacture of salt (1824) was acquired from Peshwa who sold the East India Company his quarter share.

¹ *Report of the Indian States' Enquiry Committee* (Financial) p. 81.

Radhanpur transferred her residuary half right to East India Company in 1840, the other half having been acquired already from the Peshwa. In 1845, compensation was given by Government to Rampur for abolition of transit duties by the Durbar. The Rana of Wao received an annual cash payment in 1848 for preventing all export or transit of untaxed salt from or through his territory. Travancore's right has neither been "bought out nor restricted by any agreement." Under the Inter-Portal Convention of 1864 Travancore agreed to adopt the British Indian selling price of salt. Under this Agreement Travancore has "the privilege of importing from British India all the salt required by the State at commercial price without payment of duty." Cochin is governed by the same agreement as governs Travancore.

Negotiation of the lease of the Sambhar Salt lake was started in 1869-70. A Treaty was concluded by Jaipur on 7th August, 1869 with the British Government for the lease of Jaipur's share of Joint Jurisdiction possessed by Jaipur and Jodhpur over the salt manufactured at Sambhar. It was leased for Rs. 2,75,000 a year. No duty of any kind was to be levied by the Darbar. Over and above an export of 8,25,000 maunds p.a., by the British Govt., a royalty of 20% on sales was due to Jaipur. 7000 maunds of good salt were to be given to the use of Jaipur Darbar every year.

On 27th January 1870 an identical treaty was concluded with Jodhpur for the lease of the Jodhpur share of the Joint Jurisdiction possessed by it and Jaipur of the salt manufactured at Sambhar. Under Art. V of the Treaty land could be occupied for building or other purposes, etc., and all measures could be taken that

might be necessary "for the protection or furtherance of the manufacture, sale or removal of salt, the prevention of smuggling etc." Besides the payment of Rs. 1,25,000 per annum Art. IX of the Treaty prohibited the levy by the Jodhpur Government of a "tax, toll, transit duty or due of any kind." Under Art. XII a royalty of 20% on the price per maund was due if the amount sold in or exported from the said limits by the British Government exceeded in any year 8,25,000 British Indian maunds. 7000 British Indian maunds of good salt were to be given every year for the use of the Jodhpur Darbar. A second Treaty was signed in April 1870 by Jodhpur regarding the lease of the Nawa and Gudha Salt marts situated on the Sambhur lake at a rent of Rs. 300,000 p.a., with a royalty of 40% on sales in excess of 900,000 maunds of salt per annum.

In 1879 two further treaties were concluded with Jaipur and Jodhpur suppressing other salt sources in the States on payment of compensation from the British Government.

Cutch and the maritime States of Kathiawar had arrangements concluded on a "Paramountcy basis" between 1883 and 1885. The "interests of the Empire" were pushed to the front by the Political Agent and when the Rao of *Cutch was a minor*, the Council of Regency was obliged to yield and give away the rights of the ward.

Nor could a cogently reasoned joint-protest by Junagadh, Nawanagar, Bhavnagar, Durangdhara, Morvi, Jafrabad, Porbandar and Bajane in 1880 be of any avail. Reference was naturally made by these Kathiawar powers to Colonel Walker's Settlement of 1807-08 in their protest.

The Salt Agreement signed by Maritime States in 1883 cites in the preamble the necessity of "recognizing the rights of the Paramount Power, and the duty incumbent on the Chiefs of Kathiawar so to regulate the production of salt in Kathiawar for the consumption of its inhabitants that no salt produced in Kathiawar may be conveyed into the British districts contrary to the law of British India and to the injury of the salt revenue of the British Government." Navanagar, Junagadh, Bhavnagar, Jafarabad and Morvi had signed salt agreements in 1883. Likewise, salt agreements were signed by non-maritime salt producing States, and inland States of Kathiawar in 1883.

In 1904, during a *minority regime* in Patiala, the Council of Regency had to prohibit any export of salt unless the purchaser held a British Indian licence.

The exploitation of minority regimes for depriving the ward of 'immemorial sovereign rights' as in the cases of Cutch (1879) and Patiala (1904) could not be justified on legal grounds, as a trustee renouncing existing rights of the ward would be guilty of breach of trust, assuming that a Council of Regency had the powers of the ward *vis-a-vis* alienation of such immemorial and Sovereign rights, which in law does not exist. A trustee is bound in law to fulfil the purpose of the Trust. A trustee is bound to preserve the trust-property and should maintain and defend all suits to assert and protect the title thereto. A trustee is bound to deal with trust-property as carefully as a man of ordinary prudence would deal with such property as if it were his own.¹

¹ Vide §§ 11, 19 and 15, Indian Trusts Act of 1882.

Applying these well-established legal duties, the Council of Regency at Cutch (1879) and at Patiala (1904) would be held guilty of breaches of trust.

The Davidson Committee had to hear memorials from many States making a strong protest "either against the suppression of their previously existing salt works or against the amount of compensation which the agreement gave them for such suppression." On the political side, the Committees' observation is just:—"None the less, it is evident from the representations made to us that an element of compulsion is regarded as having entered into the negotiations leading up to the agreements referred to, and that a sense of grievance still exists."¹

IX. ARRANGEMENTS FOR EXCHANGE OF POSTAL CORRESPONDENCE—TELEGRAPH AND TELEPHONE LINES

There are five States maintaining separate postal systems which have conventions with the Government of India. These are Chamba, Gwalior, Jind, Nabha, and Patiala. These conventions provide *inter alia* for

(a) mutual exchange of correspondence, parcels, and money orders.

(b) establishment of 'offices of exchange' which are the media of exchange for certain classes of postal matter and which prefer accounts in connection with money orders.

¹ *Davidson Committee Report*, p. 81.

Under an Agreement with Baroda dated 20th March 1936, the Baroda Government is enabled to get its legitimate salt revenue. (Vide Art. XVII to XX of the Agreement).

(c) recognition of postage stamps and the extent to which State stamps may be used.

(d) determination of responsibility for the loss of insured articles.

(e) mutual responsibility for bearing the cost of conveying mails.

States which have the privilege of their own postal system attach to it a value as an emblem of Sovereignty. Ten such States maintain separate postal systems and have no postal agreements with the Government of India. These are Charkhari, Cochin, Hyderabad, Jaipur, Junagadh, Kishengarh, Orchha, Shahpura, Travancore, and Udaipur. These States have the monopoly of carrying all mails consigned from one place to another within the limits of their respective territories. "In order to safeguard the unity of the Indian postal system and the convenience of the public a certain number of offices are also maintained in their territories by the Government of India Posts and Telegraph Department."¹ Twenty-seven States receive free annual grants of service stamps. In six other States official correspondence posted within the State and intended for delivery within it is carried free of charge by the Government of India Postal Department. These last are, Bahawalpur, Banganepelle, Bhopal, Mysore, Pudukkottai, and Rewa.

The Agreement with Jammu and Kashmir for construction of Telegraph lines from Jammu to Srinagar (1878) provides for supply of material and labour by the State and construction by the British Government and

¹ Davidson Committee Report, Appendix VII, p. 289.

“delivering over the lines to the Cashmere Government.” A memorandum of Agreement for the interchange of messages between the Imperial Telegraph System of the Government of India and the Telegraph System of the Kashmir State was concluded in 1897.

It remains to examine the privileges enjoyed by States in respect of obtaining a share of the receipts of the Telegraph Department. Six States, viz., Cutch, Jind, Kotah, Nawanagar, Patiala and Rewa may here be examined. Five Agreements for different telegraph lines were entered into by Cutch between 1890 and 1900. In most cases necessary capital was provided by the State (Cutch-Jind) but in some as in Nawanagar (1892) capital was provided by the Government of India, interest charges being annually debited to the cost of working the line, (e.g., Art. I of the Nawanagar Agreement). These Agreements provide for the payment to the Durbar of the estimated net profits.

X. AGREEMENTS REGARDING IMPERIAL SERVICE TROOPS

Provisions are found in treaties with Hyderabad, Gwalior, Travancore, Mysore, Baroda and the Peshwa (in 18th and 19th centuries) whereby these States undertook to supply specific contingents of their own troops to act in co-operation with the British Subsidiary force. (Art. II, III and VIII of the Treaty of 1766 with the Nizam; Article XII of the Treaty with the Nizam 1800; Art. II of the Treaty of 1805 with Travancore, Art. X of the Treaty with Gwalior 1804; Art. III of the Treaty with Baroda, 1805).

Besides these, there are provisions in several other treaties and sanads "for troops of Indian States to be supplied on the requisition of the British Government according to the means of the Rulers." (Art. IV Treaty with Alwar 1803) Art. VIII of the Treaty with Jodhpur 1818; Art. VII of the Treaty with Jaipur, 1818; Art. VI of the Treaty with Bundi, 1818; Art. VIII of the Treaty with Bikaner 1818; Art. VI of the Treaty with Bhopal, 1818, (contingent of 600 horse and 400 infantry.)

The services rendered by State troops have been invaluable during the Gurkha War, the first and second Afghan wars, and the first and second Sikh wars. During the crucial times of the Mutiny (1857-8) the help rendered by shrewd Scindhia, the gallant stand of the Sikh States of Patiala, Jind and Nabha, the sanctuary afforded to ladies by the Great Rana of Udaipur, Bikaner's valiant assistance, Rewa's loyal stand, the Nizam's signal assistance, the trusted loyalty of Travancore and Cochin, Holkar's true friendship, and "the unswerving attachment and active assistance" of the Gaekwar stand as signal services done to the East India Company which alone saved it from enveloping flames of bitterness, discontent, and racial animosity.

In 1888, Lord Dufferin announced that "the British Government proposed to invite Princes whose troops were of good fighting material to raise them to such a standard of general efficiency as would fit them to serve in action side by side with Her Majesty's forces; it would be for the Government of India to select the troops to be utilized in this manner; help would be given to them in the attainment of the efficiency desired; but they would

still remain on the footing of States' Forces."¹ The troops organized in response to this invitation were called "Imperial Service Troops."

Agreements were entered into with the British Government for "maintaining a force of Imperial Service Troops for the purpose of co-operating, if need be, in the defence of the British Empire." In the preamble to these agreements, it was stated to be "necessary to make definite arrangements for the effective control and discipline of (the Imperial Service Troops) while serving beyond the frontier of the.....State." In the clauses of the agreement, authority was given to entrust the command to officers appointed by the Governor-General-in-Council; the Indian Articles of War were made applicable to such troops while "employed on active service either within or without British India." (Vide Articles of Agreement with Alwar (1898), Bikaner (January 1899); Jaipur (January 1899) Bharatpur (Feb. 1899), Jammu and Kashmir (September 1899), Kapurthala (October 1899), Faridkot (December 1899), Bhawalpur (March 1900), Nabha (June 1900), Jind (July 1900), Patiala (July 1900). They were all approved and confirmed by the Government of India on 7th May 1901.

In these agreements there is a difference between those of the Punjab States and the agreements of Alwar, Jaipur, Jodhpur, and Bikaner on the other. Bharatpur follows the Sikh model. In the Kashmir, Patiala, and other Punjab States, the Preamble runs in its third paragraph thus:—"Whereas it is not the wish or intention of the Government of India that a British officer should

¹ Report of Davidson Committee, p. 67.

be appointed to command any corps of Imperial Service Troops, though British officers are employed in order to instruct and inspect the said troops." This is absent in Alwar, Jaipur, Jodhpur, and Bikaner agreements.

These Imperial Service Troops were utilized in China in 1903 and they rendered meritorious services in the Great War (1914-18).

After discussion with "Certain of the leading Princes" the Imperial Service Troops were reorganized under the present title of "*Indian State Forces*."

These Forces are divided into the following categories: Class A: "Units with establishment, organization, arms, and equipment the same as for corresponding units of the Indian Army and for whom arms are initially issued free of charge by the Indian Government.

Class B. "Units not organized or armed on the lines of Indian Army establishments, but which are intended to be fit to reinforce class A troops or for employment as second line troops.

Class C. Formations not permanently embodied.

On 1st April, 1931 the strength return of class A and B of the Indian State Forces provided by 49 States shows:—

Authorized Strength—43,912.

Effective Strength—37,622.

The following principles, which flow from published Correspondence laid before Parliament at various times, regarding the military establishments maintained by the protected princes, may here be cited. Sir William Lee Warner has correctly stated them:—"The armies of the

Indian States must not exceed in time of peace what is required for the maintenance of the reasonable dignity of the Chief, the enforcement of internal order, and the requirements of the special engagements which they have entered into with the British Government.”¹

XI. TRADE AGREEMENTS

The treaty with Jammu and Kashmere dated 2nd April, 1870 is a prominent instance of a treaty for affording “greater facilities than (at that time) for the development and security of trade with Eastern Turkistan. It consists of ten articles and deals *inter alia* with surveying “trade routes through the Maharaja’s territories.....to the territories of the Ruler of Yarkund,” (Art I), declaration of the surveyed route to be “a free highway in perpetuity and at all times for all travellers and traders by the Maharajah,” (Art. II), appointment of two Commissioners one by the Maharajah and another by the British Government for settlement of all disputes between carriers, traders, and travellers in the route, (Art. III), establishment of supply depots for traders, carriers and others, (Art. VII). Under Art VIII, the Maharaja agreed to “levy no transit duty whatever on the free highway; and the Maharaja further agreed to abolish all transit duties levied within his territories on goods transmitted in bond through His Highness’ territories from Eastern Turkestan to India and *vice versa* on which bulk may not be broken within the territories of His Highness. On goods imported into or exported from, His Highness’ territory, whether by the aforesaid free highway or any

¹ Sir W. Lee Warner, *The Native States of India*, p. 240.

other route, the Maharaja may levy such import or export duties as he may think fit."

The British Government also agreed "to levy no duty on goods transmitted in bond through British India to Eastern Turkestan or to the territories of His Highness the Maharaja." The British Government further agreed "to abolish the export duties now levied on shawls and other textile fabrics manufactured in the territories of the Maharaja and exported to countries beyond the limits of British India." (Art. IX)

XII. AGREEMENTS REGARDING COINAGE

The prerogative of Coinage which is still maintained in less than twenty States, is regarded as one of the most valuable rights of Sovereignty. In seven States, the local currency "constitutes a factor deserving serious consideration" from a financial point of view. Hyderabad alone has a paper currency as well as a mint; and the face value of its notes in circulation is put over nine crores of rupees by the Davidson Committee.

Two Agreements entered into with Alwar (in 1877) and Bikaner (1893) during minority regimes for abstaining 'from coining silver' in their mints for thirty years deserve to be examined here. The Native Coinage Act¹ (India Act IX of 1876) was passed to enable the Government of India to declare certain coins of (Indian States) to be a legal tender in British India. Such a power can be exercised only when the Indian State

¹ The terms "Indian State" have been substituted for "Native State" under the Government of India, (Adaptation of Indian laws) Order, 1937.

complies with the provisions of § 4 of the said Act. In the two Agreements with Alwar and Bikaner, these conditions have been complied with in four clauses:—

(i) His Highness.....agrees for himself and his successors to abstain during a term of thirty years from the date of the notification.....from coining silver in his own Mint and also undertakes that no coins, resembling silver coins, for the time being a legal tender in British India shall, after the expiration of the said term, be struck under the authority of himself or his successors or with his or their permission at any place within or without his or their jurisdiction.

(ii) Under the second clause, the agreement is made that the laws for the time being in force respecting the cutting and breaking of coin of the Government of India shall apply to the coins made for the state under the Act.

(iii) The third clause sets up the agreement not to issue the said coins below their nominal value and not to allow any discount.....

(iv) His Highness is to call in all coins made for him under the Agreement if at any time the Government of India calls in its coinage of rupees.

When the Ruler of Bikaner became a major, a letter dated 19th November, 1898 was addressed to him by the Political Agent in which certain limitations decided upon by the Government of India were communicated to him. One of which ran thus:—(a) “That no measures or acts taken or done by the Council of Regency during the minority may be altered or revised without the concurrence of the Political Officer accredited to the State.”

Mints were closed in Cutch and Sawantawadi during

minority regimes.

Minority Rules of 1917

Cherished Sovereign rights as Jurisdiction over railway territories, right to run mints and issue coins, right to cultivate poppy and manufacture of opium, and right to levy export and import duties have been ceded by Councils of Regency at Bharatpur, Alwar, Bikaner, Cutch, Sawantawadi, Patiala, Jind and Kolhapur. While legally a trustee would be guilty of breach of trust for such acts of commission and omission, the political reactions that States were exploited during such minority regimes for giving away existing valuable rights were responsible for framing new Minority Rules in 1917.¹

After consultation with the opinions of certain Ruling Princes and Chiefs and of political officers during Lord Hardinge's Viceroyalty, the policy of the Government was stated as follows:—

“The Government of India recognize that they are the trustees and custodians of the rights, interests and traditions of Indian States during a minority administration.”.....In laying down principles to be observed during minority administrations, the Government of India pointed out that “the principles laid down would be liable to relaxation in individual cases where special conditions may render their strict application inappropriate:—

(1) The administration of a state during a minority should ordinarily be entrusted to a Council. In cases

¹ Government of India. Foreign and Political Department Resolution, No. 1894—I. A., dated August 27, 1917.

where the appointment of a Regent is in accordance with the custom of the State and a suitable person is available for nomination as Regent the Council should be styled a "Council of Regency" and should consist of three to five Indian members under the presidency of the RegentWhere no Regent is available, the Council should be styled a "Council of Administration" and should consist of three to five Indian members presided over by an Indian Administrator of proved experience of Indian States."

Where expressly desired by the late Ruler the minority administration should in important matters consult with Ruling Princes or chiefs nominated by him for this purpose.

(ii) Old traditions and customs of the State should be scrupulously observed and maintained.

(iii) The regulations and records embodying the established policy of the state should be carefully studied. Except in the case of obvious and unmistakable abuses, radical changes (such as important constitutional reforms, alteration of the court language or of the postal, taxation or currency systems etc.) should as a rule be avoided.

(iv) Treaty rights should be strictly upheld and measures involving any modification of existing treaties and engagements should be avoided. No alteration should be made affecting the recognized political status of fiefs under the Suzerainty of a Durbar or their customary relations with the Ruler and his State.

(v) No State territory or other immovable property should be exchanged, ceded or sold during a minority.

(vi) No permanent or long-term commercial con-

cessions or monopolies should ordinarily be granted to individuals or companies.

(vii) The Political Officer is answerable to the Government of India for the maintenance of these principles. The degree of supervision to be exercised by him will depend on the circumstances of each particular case.

XIII. AGREEMENTS REGARDING CANTONMENTS

The retention of cantonments for His Majesty's forces is 'in many cases a military necessity as well as a treaty obligation.'

In the Treaty of alliance of 1804^{1(a)} under Art. V, Scindia agreed that when the Subsidiary force of the Company was within the territories of the Maharajah, "grain and all other articles of consumption and provision....." shall "be entirely exempt from duties" and the Company also likewise agreed not to collect any duties.....on grain camels etc., when any part of the army of the Maharajah was in the territories of the company for "purposes connected with the fulfilment" of the Treaty.

Under the Treaty of 1844 with Gwalior, it was arranged that British Cantonments should be established in the State for a contingent Force, the cost of the troops being borne by the Maharaja. By another treaty of 1860, the British Government kept a Subsidiary force constantly stationed in Gwalior in place of the contingent Force of 1844 (Treaty of 1860 abrogates the Treaty of 1844); an exchange of territory was also effected under

^{1(a)} *Davidson Committee Report*, p. 72.

the Treaty of 1860.

Secunderabad was fixed upon as a Cantonment for the British Government under Art. IV of the Hyderabad Treaty of 1798. This is the property of the Nizam and is not considered to be within 'British India.'¹

By the Agreement of 1863, the Ruler of Rajkot assigned "in perpetuity a spot of ground for establishing a civil station on its own ground" (Art. I). Neither the 'Civil Jurisdiction' (Art. VIII) nor the "Criminal Jurisdiction" (Art. IX) of the Ruler is to be curtailed by the establishment of the Civil Station. No person shall be enticed into the Civil Station. (Art. XVI).

A similar agreement was signed by the Thakoor of Wudwan in 1864 for the purpose of establishing a British station. A spot of land was assigned "in perpetuity."²

Bangalore is described by "the hybrid title of a Civil and Military Station." By a special arrangement all revenues of the Station above an agreed figure are made over to the Mysore Government.

Indore Residency Bazaars

Under Art. XIV of the Treaty of 1818 with Indore it was agreed that "an accredited minister from the British Government shall reside with the Maharaja Mulhar Rao Holkar and that the latter shall be at liberty to send a Vakeel to the most Noble the Governor-Gen-

¹ Reply of the Foreign Office cited in 21 C. 177.

² Vide 9 B. 244 for a construction of this grant. This view that Wadhwan is part of "British India" is not sound. (Vide 14 Bom. L. R. where Wadhwan is held not part of British India).

ral." Under this Article of the Treaty, Indore State has no Jurisdiction over the accredited minister or the person of his staff. The land originally assigned was 400 acres but by 1867 the Residency area had increased to 734 acres. When further areas were demanded, the request was refused by the State. In a well-argued letter, dated 3rd June, 1874, Sir T. Madhava Rao, the talented Dewan of Indore wrote to the Agent to the Governor-General protesting against the misuse of the area intended for the Agent and his suite allowed to be occupied "by natives from" Indore limits. The letter stated the difficulty caused to the Indore State by the growth of residency bazaars thus:—"If I were called upon," continued the Dewan, "to give a hypothetical case merely to enable an Englishman to realise the difficulties and perplexities entailed on us, I would offer the picture of the German Ambassador in London demarcating a certain area around his residence, inviting lots of the London population to settle around, and claiming within such area the right of administering German laws and the German System in general and claiming for the whole settlement supplies totally exempt from the taxes of England." Belated justice has been rendered by the retrocession of the residency bazaars of Indore and Hyderabad to the states respectively on 14th May 1933.

XIV. PORTAL CONVENTIONS

The maritime States include Travancore and Cochin, the Kathiawar States, Cambay, Janjira, Savantwadi, Cutch, Sachin; and Baroda in respect of its divisions of Navsari and Billimora in Gujerat, and of Amreli and

Okhamandal in Kathiawar.

The ports of Travancore State are all open roadsteads serving the needs of the population of Travancore alone.

The Inter-portal Convention of 1865 provided *inter alia* that

(i) No duties should be levied either by the Government of India or by Travancore and Cochin on goods produced or manufactured in British India on their import, whether by sea or by land, into Cochin and Travancore territories, (excepting tobacco, salt, opium, and spirits).

(ii) No duty should be levied by the Government of India on goods produced or manufactured in the two states on their import into British Indian territory, whether by sea or by land excepting salt opium and spirits.

(iii) Free trade should be established between Cochin State and the State of Travancore.

(iv) The two States should adopt the British Indian Tariff and rates of import duty on all foreign goods imported into them, tobacco being excepted on import into Travancore.

(v) Foreign goods which had already paid duty on import to British India or to either of the two States should be allowed to pass free in the event of their transport from either of these territories to the other.

(vi) Cochin State should adopt the British Indian rates of export duty on articles exported to foreign countries, pepper being excepted.

(vii) Travancore State should levy export duties, not less than those obtaining in British India but not more than Rs. 5 per cent on all ordinary exports, Rs. 10

per cent on timber and Rs. 15 a Candy on pepper and betel-nut *ad valorem*.

(viii) The two States Should adopt the British Indian Tariff valuations for exports as well as imports.

(ix) The two States should adopt the British Indian selling price of salt and be permitted to import British Indian salt on the same terms on which it was imported into British Indian ports.

On foot of the Agreement, a list of 16 ports appertaining to the Travancore State and of 3 ports appertaining to Cochin State is published.

Under the Port Agreement of 1925, the two States entered into certain financial commitments in respect of the development of Cochin harbour then and still proceeding, and it was agreed that "after that stage in the development of the new harbour had been reached when ocean-going steamers were regularly berthed within the harbour, the net customs collection at the port should be divided in three equal parts between the Government of Madras and the States of Cochin and Travancore, with the implied understanding that the Government of India would be substituted for the Government of Madras if and when Cochin, as a major port passed under the charge of the former. It was further agreed that the customs revenue collected on imports only at the Travancore ports of Quilon and Alleppey should be pooled, for the purposes of arriving at the three-party division, with the Customs Collections made at the port of Cochin. This new collection of Customs receipts has come into force as from 1st April, 1931.

The Kathiawar States

The existence of ports in Kathiawar States did not affect the fiscal interests of the Government of India before railways were developed in Kathiawar. For the purpose of the Sea Customs Act, the Government of India issued a notification in 1865 declaring the various ports in the territories of Baroda and Bhavanagar to be British ports. In 1878, a revised Sea Customs Act was passed to consolidate and amend the law relating to levy of Sea Customs duties. The Act gave power to the Governor-General-in-Council to "prohibit or restrict" transhipment to any specified ports.¹ A notification was issued in pursuance of this power on 7th May, 1879, prohibiting transhipment to all Kathiawar ports except Bhavanagar which had specific privileges by treaty.

The history of the long cordon known as "Viramgam line" from 1905-1917, the arrangement of 1917 leading to the abolition of this land customs line, the Mount Abu Conference of 1927 and reimposition of Viramgam line in 1927, the protests through memoranda made by Baroda, Nawanagar, Junagadh, Morvi and Porbandar in 1927-8 against the reimposition of the Viramgam line, orders of the Government of India in September 1929 rejecting these memorials---these belong to the history of the question which can only have a bare mention in a work of this character. The terms offered with regard to the State's claim for exemption from Customs Duty in 1927 were not accepted by Nawanagar. Lord Dunedin was accepted as sole arbitrator and in

¹ § 19, India Act VIII of 1878.

1934 a settlement was effected per findings of the arbitrator.

Bhawanagar Case

The State of Bhavanagar stands on a different category with regard to the rights acquired by her in respect of her principal port.

On 23rd October, 1860 an agreement was made between the British Government and the Thakoor of Bhavanagar which *inter alia* provided that the British Government "will collect port dues at the same rates as in British ports" and that "two-fifths of the net customs hereafter to be collected (on coastal trade) shall be retained by them" and hand to the Thakoor three-fifths of the proceeds, after deducting the necessary expenses" (Art. IX): The Government of India also agreed to this under the same article, on "condition that the Thakoor abandons his claim to compensation for the sayer duties abolished in his talooka villages." British Government also agreed not to "interfere in any way with such customs as the Thakoor chooses to levy on trade to and from British ports on the continent of India."

The Agreement of 1860 was revised in 1866 when it was agreed that customs and port dues at Bhavanagar would in future be collected by the Durbar instead of by the Government of India. The British Government also abandoned its remaining right to two-fifths of the custom collections on foreign trade in return for the surrender by the Durbar of its right to compensation for abolition of its mint and of other rights in the customs of Gogo valued at Rs. 6,890-2-2 (Cl. 10 and 11). In

both the Agreements of 1860 and 1866, the Government agreed "to admit Bhavanagar to the full benefits of a British port, so far as the Thakoor may desire." The Bhavanagar Darbar very properly called this "a solemn engagement entered into with Government" in their memorandum to the Davidson Committee.

Cambay

Under an Agreement with the East India Company, the East India Company had acquired a nominal half share in the sea and land customs of Cambay.¹ Under the Agreement of 1885, the Nawab of Cambay agreed to adopt the British Customs tariff and rules of administration. (Cl. II). By "right of conquest from the Peshwa," the British Government had derived the right of control and management, (*vide* also Cl. IV of the Agreement of 1885). This agreement also provided that the British Indian share in the sea-customs was commuted for an annual payment of "two hundred British Indian rupees." By a subsequent declaration this right was waived.

Janjira

Under an Agreement of 1884, the Nawab agreed to adopt the British Indian Tariff and customs system at his ports and to "assimilate.....as far as it may be possible" port dues to the scale in force at neighbouring British ports. He also agreed to give full facilities for the inspection of his customs houses by the Political

¹ Aitchison, IV Ed., Vol. VII, p. 67.

Agent and to abolish land customs and transit duties (Art. I). In return for this, the Cordon of Preventive and Customs Stations heretofore maintained by the British Government and the Nawab on the land frontier "shall be removed." No duty was required to be charged on articles imported at Janjira ports for the use of the Nawab and his family. In consideration of the stipulations regarding trade and smuggling of salt, opium and liquor, the British Government agreed to pay annually the Nawab Rs. 13,000/- on the first May of each year (Art III).

Sawantwadi

By an Agreement concluded on 15th September 1838 the Ruler renounced "all claims to the sea and land customs" which he had hitherto levied. (Art I). The state made over to the East India Company's Government the right of establishing customs ports on his frontier as well as at the port of Banda (Art. II). In return the Company agreed to pay him compensation for loss of customs revenue based on the average of the collections of the preceding three years (Art. IV) and Rs. 500/- in respect of customs duties levied on goods imported *via* Goa for his own use.

Cutch

Art. XV of the Treaty with Cutch (1819) runs as follows:— "The Kutch ports shall be open to all British vessels, in like manner as British ports shall be free to all vessels of Kutch, in order that the most friendly intercourse may be carried on between the Governments."

Barring reciprocity in treatment of vessels of the two contracting parties, any specific reading into them of a provision regarding imposition of customs duties appears *prima facie* far-fetched.

Cutch has preferred to follow her own policy and it is unique in this feature that Cutch exercises the right of levying sea customs on a tariff which differs from that of British India.

Baroda

Baroda is a maritime State in respect of Navsari and Billimora in Gujerat, and in respect of Amreli and Okha in Kathiawar.

The Baroda Government claims that its rights and liabilities in respect of ports and customs in Kathiawar are defined by a Treaty of 1817 with the East India Company and by an engagement of 1865 with the Government of India... Art. VII of the Treaty of 1817 has elaborately set forth mutual freedom of commerce, navigation and transit between "the Honourable Company and Maharaja Anund Rao Gaekwar.....Bahadur." Under the Engagement of 1865 with the Government of India, Baroda claims to be a member of a customs union with British India and to be entitled to develop its ports and retain all the customs revenue collected at them.

In 1861, the Secretary of State gave a decision that the Government of India, as the inheritor of the Peishwa's Suzerainty, had the right to forbid the opening of ports on the Gujerat sea-board of Baroda State.¹

¹ In 1923, The Baroda Government requested for reconsidera-

The customs revenues of the ports of Navsari and Billimora (in the Gujerat sea-board) were allotted to the Peishwa in 1752 under the partition between the Gaekwar and the Peishwa. The Peishwa transferred these rights to the British Government under the Treaty of Bassein (1802). The Government of India are in the peculiar position of possession of customs administration and customs revenue of these two ports of Baroda State. It is necessary to record here that an agreement has been entered into with Baroda in March 1936 on the basis of Baroda's Sovereignty over Navsari and Billimora¹ (Vide Art. I to XVI).

Hyderabad

Hyderabad, though not a maritime State, has put claims based on certain articles of the Hyderabad Commercial Treaty of 1802:—

Arts. I and III of the Treaty run as follows:—

“As the testimony of the firm friendship, union and attachment subsisting between the Honourable Company and H. H. the Nawab Asuph Jah, the Honourable Company hereby agree to grant to His Highness, the free use of the seaport of Masulipatam, at which port His Highness shall be at liberty to establish a commercial factory and agents, under such regulations as the nature of the Company's Government shall require and

tion of the decision of 1861. New evidence of *actual exercise* by Baroda of the right to open ports in Baroda north of the Tapti upto 1803, was let in and the Agreement of 1936 recognizes Billimora and Narsari as Baroda ports.

¹ The writer is indebted to the Baroda Durbar for this information.

as shall be adjusted between the Governor-General in Council and His Said Highness. There shall be free transit between the territories of the contracting parties of all articles being the growth, produce or manufacture of each respectively; and also of all articles being the growth, produce or manufacture of any part of His Britannic Majesty's Dominions."

Jammu and Kashmir

Through her treaty rights, Kashmir has an interest in sea-customs. Under Art. VIII of the Treaty of 1870, the Maharaja agreed to refrain from taxing, all merchandise passing through the free highway in the Central Asian trade route, thus establishing free trade between British India and Central Asia. In return for the loss of revenue thus occasioned, the British Government agreed to "levy no duty on goods transmitted in bond through British India.....to the territories of His Highness the Maharaja." (Art I).

XV. OTHER MISCELLANEOUS AGREEMENTS

Certain miscellaneous agreements have been gone into for ceding lands for a sanatorium, for construction of canals, for leasing of forests, and regarding waterways and reservoirs which still remain to be examined.

The circumstances under which Darjeeling has been made over to the East India Company are found in the deed of Grant dated 1st February, 1835. "The Governor-General having expressed his desire for the possession of the Hill of Darjeeling, on account of its cool climate, for the purpose of enabling the servants of his Government,

suffering from sickness, to avail themselves of its advantages.....the Sikkimputtee Raja, out of friendship to the said Governor-General," presented "Darjeeling to the East India Company."

The Jaghirdar of Sandur ceded lands for a British Sanitorium at *Ramandurg* in 1847. The ownership of the land lay with the Jaghirdar (Cl. I) who would continue to receive the income derivable from fruit trees, jungles, etc., connected with the hill (Cl. II). The Jaghirdar had reserved to himself while executing the *Tabanamah* right to treasure-trove, etc., hidden in land over which bungalows and house might be erected (Cl. V).

The Ruler of the Trans-Sutlej State Chamba executed a lease agreement of the Chamba forests for twenty years in 1864 to the British officer who will be appointed by the British Government. The sole control of all forests in the territory of Chamba was vested in the British Government (Art. I). A minimum income of Rs. 207,000 p.a., was guaranteed under Art. XIII.

A revised agreement was entered into in 1872 to make *inter alia* more definite provisions for the proper conservancy of forests. A renewal of the Agreement was made for another twenty years in 1904. The forests were experimentally transferred to the Ruler in 1907-08 for five years. The experiment proving a success, the permanent restoration of control to His Highness was sanctioned in 1913. The forests are being administered by an officer of the Imperial Forest Service lent to the state.

An agreement was made between the British Government and the states of Patiala, Jhind and Nabha

regarding the Sirhind Canal in 1873. The Seigniorage to be paid by the States interested in the Patiala branches in consideration of the water supplied to them by the British Government will be at a rate not exceeding four annas per acre (Cl. XVI).

A share of the navigation tolls of the main canal shall be allotted to the States concerned in proportion to their share of the entire water-supply (Cl. XXXIV).

The Final Working arrangement of Sirhind Canal between the Imperial Government and the signatory states was concluded in 1903-04.

The Periyar Lease was executed on 24th October, 1886 between Travancore and the Government of India, by which in consideration of rents reserved and covenants by the Secretary of State for India, "a tract of land part of the territory of Travancore situated on or near the Periyar at the site of the dam to be constructed was given by the lessor—the Ruler of Travancore. The purposes of the lease were stated to be full right, power, and liberty to construct and carry out on any part of the said lands and to use exclusively when constructed all such irrigation works and other works ancillary thereto as the lessee shall think fit for the purposes of or any purpose connected with the Periyar Project..." "All waters flowing into, through, over, or from the said tract of land.....demised the right of fishing in, over and upon such waters tanks and ponds"—was also mentioned specifically (VI Clause).

A question has risen up for decision on account of the contemplated extended use of these waters for *generating power* by the lessee. Interesting points of the intended use of waters under the document have arisen

for decision. As contemplated under the Lease deed two arbitrators were appointed to decide the dispute.¹ The two arbitrators having differed, an umpire was appointed. The Umpire's decision since given is in favour of the correct contention of Travancore that the lessee has the right to use the water for irrigation purpose only.²

XVI. THE BERAR AGREEMENTS

The vexed question of Berar is still not free from controversy. Its origin goes back to 1766 and as a statesman of the eminence of Lord Ronaldshay has put Lord Curzon's views thus:—"there were passages in the history of the relations between the Company and the Nizam which were not in strict accordance with the most scrupulous standards of British honour."³ It is not within the scope of this work to deal with it continuously through all its phases. Lord Dalhousie's Treaty of 1853, the Treaty of 1860, Curzon's Agreement of 1902, Lord Reading's letter of 1926, and the Agreement of 1936 need alone be discussed.

Lord Dalhousie's Treaty of 1853

A close study of the letters of Colonel Low, the Resident who had succeeded General Fraser, impresses on a student of history that the Treaty was founded on intimidation and compulsion. In his minute of the

¹ The present author appeared as Junior Counsel for Travancore in the first stage in August 1936.

² Vide *Periyar Waters Right Dispute*, Umpire's Award, p. 21.

³ Ronaldshay, *Curzon*, Vol. II, p. 216.

conversation with the Nizam made on 12th March, 1853, the Nizam's chafing against the costliness and need of the contingent read thus:—"In the time of my father (said His Highness) the Peishwa of Poona became hostile both to the Company's Government and to this Government, and Sahib Jung (meaning Sir Henry Russell) organized this contingent and sent it in different directions, along with the Company's troops, to fight the Mahratta people, and this was all very proper, and according to the treaty for those Mahrattas were enemies of both states; and the Company's army and my father's army conquered the ruler of Poona and you sent him off a prisoner to Hindoosthan, and took the country of Poona. After that there was no longer any war; so why was the contingent kept up any longer than the war?"

The argument that the financial liability to maintain the contingent arose since the clause in the Treaty of 1800 to demand "at any moment 15,000 troops" from the Nizam had been broken in former times was suggested in reply by Col. Low, the Resident. But the Nizam's denouncing his responsibility since Raja Chandoo Lall alone consented to the contingent is untenable in law as well as political theory.

Another line of argument by the Nizam is clear from the Minute of Col. Low dated May 4, 1853. Asks the Nizam, "Did I ever make war against the English Government, or intrigue against it or do anything but co-operate with it and be obedient to its wishes, that I should be so disgraced?"¹ Continued the Nizam powerlessly:—"Two acts on the part of a Sovereign

¹ Printed in Briggs, *The Nizam*, Vol. I, p. 394.

prince are always reckoned disgraceful; one is to give away unnecessarily any portion of his hereditary territories, and the other is to disband troops who have been brave and faithful in his service."

In the same minute it is stated that the Nizam in a tone of anger of 'no ordinary degree' exclaimed, "You think I could be happy if I were to give up a portion of my kingdom to Your Government in perpetuity; it is totally impossible that I could be happy; I should feel that I was disgraced."

When there was some hesitation thus on the Nizam's part to execute the Treaty assigning the revenues of certain districts for the liquidation of his debt, writes Mr. Briggs, "an English officer was seen, for days together, moving about the outworks of the city with telescope in hand, as if ascertaining the defences to some dangerous intent."

Colonel Davidson, Resident at Hyderabad, wrote in a letter to the Foreign Secretary dated Hyderabad October 12th, 1860:—"I was present during the negotiations that took place in 1853.....I witnessed the objurgations and threats then used in order to induce the late Nizam to acquiesce in the Government's proposals."

The Treaty of 1853 was concluded under such pressure administered to a 'friend and ally.' By it, the British Government agreed to maintain in addition to the subsidiary force, an auxiliary force, called the "Hyderabad Contingent" (Art. 3) of not less than 5000 infantry, 2000 cavalry and four field batteries of artillery. In order to provide for the payment of this force and for certain pensions and the interest on the debt, the Nizam assigned the districts in Berar, Dharaseo, and Raichur

Doab which were estimated to yield a gross revenue of fifty lakhs of rupees. It was also agreed that the Resident at the Court of Hyderabad "shall always render true and faithful accounts every year to the Nizam of the receipts and disbursements connected with the said districts, and make over any surplus revenue that may exist to His Highness, after the payment of the contingent and the other items detailed in Art. 6." (Art. 8).

Other Points of Criticism

A perusal of the speech of Colonel Sykes in the Court of Directors suggests a preliminary basic argument. "Although Captain Sydenham, the Resident, for the first time designates the Nizam's infantry as the Nizam's contingent, he does not claim the shadow of authority for the designation. The Resident neither adverted to the authority of the Nizam for it, nor does it appear that the Nizam directly or indirectly sanctioned it, or even knew of it."¹ The official argument that the responsibility for financing the contingent lay on the Nizam under the Treaty of 1800 has now to be given up. Lord Dalhousie himself though he was pressing this line of argument in his *Kbureeta* to the Nizam (27th May, 1851, is the date of his Minute) is found giving it up in his Minute of 30th March, 1853. In the 44th paragraph of the above minute the Governor-General says: "I for my part, can never consent, as an honest man, to instruct the Resident to reply, that the contingent has been maintained by the Nizam from the end of

¹ Extracted in *Memoirs and Correspondence of General Fraser*, p. 359.

the war in 1817 until now, because the 12th article of the Treaty of 1800 obliges His Highness to maintain it."

Assuming without admitting that the advances made by the British Government for its pay constituted a debt properly charged against the Hyderabad State, had not the Nizam counter-claims against the East India Company? The British Government reduced the numbers of the Subsidiary Force and its own expenditure without Nizam's consent and against Treaty obligations; Major Moore had explained this position in his Dissent to the Court of Directors on 7th November, 1853. In law and equity these savings ought to have been credited to the Nizam's Government.

The profits from the "Secunderabad Abkaree" derived by the Company used to amount according to General Fraser, the Resident, to Rs. 60,000/- p.a. Lord Dalhousie in his imperious tone answered that this "belonged to the Power whose troops they are." But the Resident (Colonel Davidson) gave expression to a different opinion in a Despatch to the Government of India dated 12th October, 1860. He calculated that a credit of £ 410,000 would have been got by the Nizam through surplus of Abkaree revenues from 1812-1853. He thus concluded that "in his opinion" in 1853 we had little or no real pecuniary claim against the Nizam."

Treaty of 1860

Inconvenience and embarrassing discussions were necessitated by the clause in the Treaty of 1853 regarding submission of annual accounts. The Nizam's

invaluable services to the British Government during the Mutiny of 1857 were also borne in mind prior to the treaty of 1860. The lands assigned by Hyderabad yielded much more than was needed for the up-keep of the contingent. The surplus districts of Dharaseo and the Raichur Doab were handed back under the Treaty (Art. 5). The remaining assigned districts in Berar were to be "held by the British Government in trust" (Art. 6) for the purposes specified in the Treaty of 1853. But no demand for accounts of the "receipts and expenditure of the Assigned Districts for the past, present or future" is to be made according to the agreement to forego it by the Nizam (*vide* Art. 4 of the Treaty of 1860). Berar could be said to be held "under a sort of mortgage as a security for the fulfilment of certain engagements."¹

Lord Curzon's Settlement

A comprehensive permanent settlement of the question under which the Nizam would receive an annual rent was at the background when Imperialistic Curzon visited the Nizam in March, 1902. On one side Lord Curzon felt that to both the Nizam and Hyderabad "perhaps, we owe some reparation." It would be highly profitable to Britain "since, with no great sacrifice, and with the prospect of early financial gain, we shall have laid the Berar ghost for ever."²

Though he had heard misgivings about the Ni-

¹ Obiter of Bayley J. in *Triccam Pancachand vs. B. B. & C. I. Ry.* 9 B. 244 at 249.

² Minute by Lord Curzon, Sept. 25 1901.

zam's frame of mind, a private interview with the Nizam had brought about the prospects of the treaty easy. Two summaries of this historic conversation have been contributed to the Blue-book. The Nizam's account is short and blunt, while the Viceroy's "summary flows on in column after column of argumentative eloquence." In the course of the discussion, the Nizam explained that "so long as there was the smallest chance of the complete restoration to him of the occupied territory he would not feel justified in entering into any fresh agreement. If he learned from the Viceroy's own lips that no such chance existed, he would gladly accept the solution of the question which the Viceroy offered him." As the biographer of Lord Curzon adds with gentle pathos "Lord Curzon experienced little difficulty in satisfying him on the point, and from that moment all doubt as to the successful issue of the negotiation disappeared."¹ Not for the first time had it fallen to brilliant Curzon's lot to leave behind situations pregnant with later explosions. "Great triumph" he has had in settling "the famous Berar question, which has been a standing sore between Hyderabad and ourselves for 50 years."² Lest any coercion be smelt in his conversation with the Nizam, he begged the Secretary of State for India, "Now pray do not think, that the Nizam yielded out of personal deference to me or from weakness or in alarm. He yielded in deference to my arguments and because he is firmly convinced that I am a friend to him

¹ Ronaldshay, *Curzon*, Vol. II p. 218.

² Curzon's letter to Sir S. Macdonnell dated April 01, 1902.

and his State. Nor need you be afraid of any remorse or regret on his part. I venture to assert that at this moment he is the most contented man in Hyderabad.”¹

The Agreement of 1902

On 5th November, 1902 an agreement was signed between the Nizam and British Government which was confirmed by the Government of India on 16th December, 1902. “(i) His Highness the Nizam whose sovereignty over the Assigned Districts is reaffirmed, leases them to the British Government in perpetuity in consideration of the payment to him by the British Government of a fixed and perpetual rent of 25 lakhs of rupees per annum;

(ii) The British Government while retaining the full and exclusive jurisdiction and authority in the Assigned Districts which they enjoy under the Treaties of 1853 and 1860, shall be at liberty, notwithstanding anything to the contrary in those Treaties, to administer the Assigned Districts in such manner as they may deem desirable, and also to redistribute, reduce reorganise and control the forces now composing the Hyderabad Contingent, as they may think fit, due provision being made as stipulated by Art. 3 of the Treaty of 1853 for the protection of His Highness’ Dominions.”

The administration of Berar was entrusted to the Chief Commissioner of the Central Provinces and the Hyderabad Contingent has ceased to exist, the artillery having been disbanded and the cavalry and

¹ Letter dated April 2, 1902.

infantry absorbed in the regular army. The Governor-General in Council was legislating for this area under Orders in Council under the Foreign Jurisdiction Act.¹

Under the Government of India Act 1919

Berars were administered with, but not as part of the Central Provinces. The inhabitants elected a certain number of representatives who were then formally nominated as members of the Central Provinces Legislature; and legislation both of that legislature and of the Central Legislature has been applied to the Berars through the machinery of the Foreign Jurisdiction Act.² Berar, being Hyderabad territory, the inhabitants of Berar are not British subjects but are subjects of the Nizam. Under Rule 14(2) of the Devolution Rules, the revenues of Berar were allocated to the Local Government of the Central Provinces as a source of Provincial Revenue, but with the proviso that "if in the opinion of the Governor-General in Council provision has not been made for expenditure necessary for the safety and tranquillity of Berar, the allocation shall be terminated by order of the Governor-General in Council or diminished by such amount as the Governor-General in Council may by order in writing direct."

Lord Reading's Letter

The Nizam had the satisfaction under Curzon's

¹ Vide *Dattatraya vs. Secretary of State*: 57 I. A. 318.

² Vide J. P. C. Report, para 61.

treaty of his birthday being celebrated in Amraoti, the Capital of Berar, by firing a Salute, to visualize a sign of his Sovereignty. The present Nizam questioning the validity of pledging posterity asked for a Commission to inquire into the whole case and for an account to be rendered of the pecuniary dealings between the two Governments. The Nizam was arguing his position of internal sovereignty *vis-a-vis* the Berar question thus:—“No foreign power or policy is concerned or involved in its examination and thus the subject comes to be a controversy between the two Governments that stand on the same plane without any limitations of subordination of one to the other.” Lord Reading took occasion to develop in his reply letter dated 27th March, 1926, an extension of paramountcy as “based not only upon treaties and engagements” but existing “independently of them and quite apart from its prerogative in matters relating to foreign powers and policies.”¹ He stressed the hard fact that “no ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing.”

The Nizam further urged that the doctrine of “*Res Judicata*” has been misapplied to matters in controversy between Hyderabad and the Government of India. To this aspect of the case, Lord Reading replied to the Nizam that the orders of the Secretary of State on “your representation amount to a decision,” “It is the right and privilege of the Paramount Power to

¹ For a criticism of this view of Lord Reading and that of the Butler Committee vide the chapters on “Paramountcy” in K. R. R. Sastry, “*Indian States*”, 1939.

decide all disputes that may arise between states or between one of the states and itself, and even though a Court of Arbitration may be appointed in certain cases, its function is merely to offer independent advice to the Government of India, with whom the decision rests." The portion of Lord Reading's reply regarding the use of the term *Res Judicata* is the least convincing. "The Government of India is not like a civil court precluded from taking cognizance of a matter which has already formed the subject of a decision." Thus far it is correct legal exposition; his following sentence urging the efficacy of "the legal principle of *Res Judicata* on sound practical considerations" in realms of diplomacy cannot be supported from municipal law, or international law. It comes to this, that if it serves the Paramount Power it will import analogies from the legal regions while at the same time standing stubbornly against anything like a legal interpretation of solemn treaties, engagements and *Sanads*. The fact is that the Ex-Lord Chief Justice of England was here functioning as the proud proconsul sitting in the *gadi* of the Great Moghul in the direct line of Wellesley, Dalhousie and Curzon.

With reference to the Nizam's request for the appointment of a Commission to enquire into the Berar Case and submit a report, Lord Reading reminded the Nizam that "if however you will refer to the document embodying the new arrangement, you will find that there is no provision for the appointment of a Court of arbitration in any case which has been decided by H. M.'s Government, and I cannot conceive that a case like the present one, where a long controversy has been

terminated by an agreement executed after full consideration and couched in terms which are free from ambiguity, would be a suitable one for submission to arbitration."

The impression whether any pressure was brought to bear on the then Nizam by his "distinguished predecessor, the late Marquis Curzon," is reassuringly answered thus by Lord Reading, "I am glad to observe that in your latest communication, you disclaim any intention of casting imputations" on the late Marquis Curzon.

Under the Government of India Act 1935

The Act gets rid of the anomalous position. Under the Act, the administration of Berars, "notwithstanding the continuance of the Sovereignty of His Exalted Highness over Berar," shall be as part of the Central Provinces (§ 47). The Berar members will in their oath of allegiance to His Majesty save their allegiance to His Exalted Highness in Form III of the fourth schedule to the act. Under § 52 (2) the Governor of Central Provinces and Berar is vested with a special responsibility of securing that a reasonable share of the revenues of the Province is expended in or for the benefit of Berar; and the Instrument of Instructions issued to him directs that if he is "at any time of opinion that the policy hitherto in force affords him no satisfactory guidance in the interpretation of his special responsibility he shall, if he deems it expedient, fortify himself with advice from a body of experienced and unbiassed persons whom he may appoint

for the purpose of recommending what changes in policy would be suitable and equitable."

The Agreement contemplated under § 47 was concluded with the Nizam on 24th October, 1936. This has definitely reaffirmed and recognized His Exalted Highness' Sovereignty over Berar and allowed its administration with the Central Provinces under the Government of India Act 1935. With effect from 13th November, 1936 the Nizam shall hold the dynastic title of "H. E. H. the Nizam of Hyderabad and Berar." The King Emperor was also graciously pleased to command that the Heir-Apparent of the Nizam shall be called "His Highness, the Prince of Berar." An agent to the Nizam has been recently appointed to represent the Nizam at the Capital of Central Provinces and Berar under Art. XI of the Agreement. This Agent is "for the purpose of representing the views of his Government with reference to any matter which is of common interest to the Central Provinces and Berar and to Hyderabad or which directly affects the interests of Hyderabad;" save as aforesaid "the said Agent shall have no concern with any of the internal affairs of the Central Provinces and Berar."

This Agreement which has been made in substitution for the Agreement of 5th November, 1902, consists of 20 Articles with a Schedule. Provision for determining the Agreement on certain amendments being made as, for instance, inconsistent "with any of the provisions" of the Agreement is made in Art. 17. In an authoritative collateral letter written to the Nizam by the Viceroy dated 26th October, 1936, provision is made for the unfortunate contingency of the

agreement coming to an end. His Majesty, it is stated, "enters into the agreement" on "the clear understanding".....that in such a contingency, He may "exercise full and exclusive jurisdiction and authority" in Berar. The parts of the Agreement which would remain unaffected are the following:—

(i) the recognition of the Sovereignty of H. E. H. the Nizam over the Berar,

(ii) the payment of the sum of twenty-five lakhs of rupees p.a., to the Nizam,

(iii) any of the military guarantee which under existing treaties the Nizam enjoys;

(iv) The Consent of the Nizam would be necessary if any arrangement for the administration of Berar were made "upon a basis essentially different from that which exists at the present time."

It has to be noted that this elucidatory letter is of value only as evidencing the mind of His Majesty on one side.

The Berar Question is a standing example of one of the results of maladministration of Indian States. It serves as a signal instance through its different phases of the growth and development of the undefined Paramountcy, defying juristic analysis.

XVII. ROYAL PROCLAMATIONS AND ASSURANCES

For legal and political purposes, the Royal Proclamations and Coronation messages have had a confirming and reassuring effect on the Rulers.

The Good Queen's Proclamation of 1858 announced *inter alia* "to the Native Princes of India that all

Treaties and Engagements made with them by or under the authority of the Honourable East India Company are by Us accepted and will be scrupulously observed; and we look for the like observance on their part. We desire no extension of our Present Territorial possessions; and while We will admit no aggression upon our Dominions or Our rights to be attempted with impunity, we shall sanction no encroachment on those of others. We shall respect the rights, dignity, and honour of Native Princes as our own, and We desire that they, as well as Our own subjects, should enjoy that prosperity and that social advancement which can only be secured by internal peace and good government."

To like effect in King Edward VII's Coronation message, 1903, a memorable passage ran thus:—"To all my feudatories and subjects throughout India, I renew the assurance of My regard for their liberties, of respect for their dignities and rights, of interest in their advancement, and of devotion to their welfare, which are the Supreme aim and object of my rule, and which, under the blessing of Almighty God, will lead to the increasing prosperity of my Indian Empire, and the greater happiness of its people." Again in King Edward VII's Imperial message of 1908 it runs thus:—"the rights and privileges of the Feudatory Princes and Ruling Chiefs have been respected, preserved, and guarded and the loyalty of their allegiance has been unswerving."

At the Delhi Coronation Durbar, 1911, King George V spoke thus:—"Finally, I rejoice to have this opportunity of renewing in My own person those assurances which have been given You by my revered

predecessors of the maintenance of Your rights and privileges and of my earnest concern for Your welfare, peace, and contentment." In His Proclamation of 1919 the occasion was availed by King George V "to assure the Princes of India of (his) determination ever to maintain unimpaired their privileges, rights and dignities." Again in his Proclamation of 1921, King George V assured the Princes that the foregoing pledge remained "inviolable and inviolable."

CHAPTER IV

NATURE AND STATUS OF INDIAN
STATES

Problems relating to the position of the Indian States cannot be satisfactorily discussed with reference to purely juristic criteria. In view of the admitted facts, any attempt to evolve a formula must be a failure. Thus judgment on the matter on one side or the other must be more or less arbitrary. At every point of study of the problems of Indian States, one finds purely legal ideas or jural concepts made inapplicable owing to the inroads made by the tentacles of paramountcy or by more subtle applications of the doctrine of act of state "defying jural analysis." The esteemed Indian statesman, the Rt. Hon. Sir T. B. Saprú, had these inherent difficulties in mind, when he wrote, that "the temptation to indulge in legal and constitutional theories, not wholly applicable to the facts as we find them, is as great as the temptation on the other hand to take shelter behind the theories of the divine right of Kings and conceptions of Government wholly inconsistent with the spirit of the time."¹

The status of Indian states has had examination by a bewildering variety of writers from the shallow

¹ Introduction to G. N. Singh's *Indian States and British India*.
p. 8.

globe-trotter up to the serene constitutional expert. Nor can it be forgotten that protagonists of State-rights have contributed works with a special bias. The Indian States' Committee's examination of the legal position of the Indian States has been jejune as stated by Mr. D. B. Somervell, K.C., in a later contribution of his.²

It is also necessary to have a short historical retrospect before discussing the status of the Indian States. Sir Benjamin Lindsay has correctly summed up this historical background that the passage deserves repetition:—The Indian States are “for the most part survivals of former dynasties and powers, which in one way or another, contrived to prolong their existence after the collapse of the Moghul Empire and the ensuing struggle for supremacy which ended in favour of the British. Some of them while the Moghul Empire still stood, had been able to establish themselves in a position of practical independence, yielding only a nominal allegiance to the Emperors of Delhi, and were able later to secure recognition from the British Power. Others of them, such as the Rajput States of Central India, had been engaged for centuries in conflict first with the Moghuls, later with the Mah-rattas and were only rescued from extinction by British intervention which secured them in possession of such territories as they had been able to retain. Still others were principalities carved out during the short-lived period of Mahratta domination in Western India by soldiers of fortune who came to terms

² *British Year-Book of International Law*, 1930, p. 55.

with the British forces which broke up the Mahratta Confederation."

By the beginning of the nineteenth century, British supremacy had been consolidated over the major portion of India. In March, 1804, Lord Castlereagh wrote, "Our existence in India should pass from that of traders to sovereigns." In 1806, the Duke of Wellington said that the British Government had become paramount in India by the conquest of Mysore. There is force in the opinion of Sir Charles Aitchison, one of the official mentors of the famous Political and Foreign Department, that the campaigns against the Mahratta chiefs in 1803 and against Holkar in 1805 established once for all the supremacy of the British Power. By 1818, there was no power in India except the Sikh State of Ranjit Singh that could claim independence. In his just Minute on Bharatpur, Metcalfe wrote:—"We have become the paramount state in India." Till 1829, in his correspondence with the Governor-General, the Nizam used the phrase "*Ma ba-Dawlat*" (we, with government, power, might) and the Governor-General "*Niaz-Mand*" (Supplicator) which admitted an inferiority in rank. After that year their correspondence was conducted on a footing of equality. Homage continued to be offered to the Great Moghul till the cold season of 1842-43, when it was prohibited by Lord Ellenborough.

"With the extinction of the Sikh Kingdom after the Second Sikh War (1848-9) all state-territory in India"³ came under British protection. After the sup-

³ *Journal of Comparative Legislation and International Law*, Feb.

pression of the Mutiny (1857-8) which was effected with the timely and substantial aid of many of the State-Rulers, the British Crown assumed the direct Government of India as (per Lord Canning, the first Viceroy) "the unquestioned Ruler and Paramount Power in India."

There are nearly "600"⁴ States graded into three classes by the Indian States' Committee.

- | | | |
|------|--|-----|
| I. | States which are members of the Chamber of Princes in their own right .. | 109 |
| II. | States, the rulers of which are represented in the Chamber of Princes by twelve members of their Order elected by themselves | 126 |
| III. | Estates, Jagirs and others | 327 |

The first two classes have in greater or less degree, political power, legislative, executive and judicial over their subjects.

The petty states of Kathiawar and Gujerat numbering 286 out of 327 in the third class are organized in groups called *Thanas* under officers appointed by the local representatives of the Paramount Power who exercise various kinds and degrees of criminal revenue, and civil jurisdiction.

Lord Olivier has correctly divided the Indian States into three classes:—

- I. Quasi-sovereign States with treaties in which

1938, pp. 91-92.

⁴ The number goes up to "601" in the latest Memoranda on Indian States, 1940.

sovereignty and rights of internal government have never been surrendered.

II. Those in which certain rights of interference have been established by treaty and whose independence is thus partial and subject to effective supervision.

III. Great number of petty states the sovereign control of which has been taken over by the transference of their vassalage, from some other Indian sovereign State which previously exercised or claimed dominion over them.”⁵

Sirdar D. K. Sen has classified Indian States under seven divisions graded according to their respective *de jure* and *de facto* status. It has become a moot question whether these series of relationships that have grown up between the Crown and the Indian Princes “under widely differing historical circumstances” have not been made gradually to conform to a single type.”⁶ Anyway Sirdar Sen’s classification gives a correct insight into the widely differing status of these States varying from Baroda, Gwalior, Indore, Bhopal and the Phulkian states of the Punjab which were sovereign *de jure* and *de facto* to the States which form the class of mediatized and guaranteed states.

Mr. A. B. Latthe, criticising all these classifications suggests a three-fold classification in a dynamic setting:—

(1) States which have or may have as full powers of internal autonomy as possible.

⁵ Foreword to K. M. Panikkar’s work on *Relations of Indian States with the Government of India*, p. 7.

⁶ Lord Curzon’s Bhawalpur Speech, 1903.

(2) States which have or may have the same powers of full internal autonomy consistent with their being grouped together to form such units of a Federation.

(3) States which have limited jurisdiction and powers of legislation even at present and are not entitled by treaty or usage to full jurisdiction and unlimited powers of legislation.⁷ When so classified, about 200 States alone would remain; and the rest would have to be converted into Zamindaries and amalgamated into the Government of India. No treaty commitment would be violated as about 400 petty Jaghirs have been artificially protected by British Paramountcy, which has become "a hospital with numerous patients incurable but undying."

Legal Theory

Grotius, Pufendorf, and Vattel agree that in unequal alliances the inferior power remains a sovereign State. Over the disputes and internal dissensions of its subjects, the *Suzerain* power has no jurisdiction as such. Vattel writes that a weak State which in order to provide for its safety places itself under the protection of a more powerful one and engages to perform in return several offices equivalent to that protection without, however, divesting itself of the right of Government and sovereignty, does not cease to rank among the sovereigns who acknowledge no other law than the law of nations. The eminent lawyer, Mr. Evans

⁷ (a) A. B. Latthe, "*Problems of Indian States*", pp. 7 and 8.

had developed this opinion of international publicists in his argument in *Lachmi Narain vs. Raja Pratap Singh*⁸ while he summed up that "it is clearly recognized by the text-writers in International Law that a State may exist *qua* State viz., retain its "*political personality*" notwithstanding a very great "*immunitio imperii*" resulting from its relation with other States."

In his celebrated Minute in the Kathiawar Case (1864) Sir Henry Maine has argued out the position of divisibility of sovereignty in words which have since then become classical. "Sovereignty is a term which in International Law indicates a well-ascertained assemblage of separate powers and privileges..... there is not, nor has there ever been, anything in International Law to prevent some.....rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible."

In a note in Wheaton § 38 (C), the real character of the Indian States is thus stated:—The Protected Princes "enjoy and exercise under the sanction of the British Government the functions and attributes of internal sovereignty, but they are bound to receive the Resident or Agent appointed by the Viceroy. The Indian Government has formally declared that the principles of International Law have no bearing upon the relations between itself and the Native States under the Suzerainty of the King. Whether this declaration is rigidly correct or is completely followed in practice may perhaps be doubted, but it is clear that the "Native Princes of India have no international

⁸ 2 A. I. at p. 3.

status in the sense in which it is used *in this volume*.”⁹ (On ‘*International Law*’).

One of the trusted officials admitted to a full knowledge of the relations between the Governor-General and these States, Sir Lewis Tupper, was responsible for the theory of feudal relationship between the *Suzerain* and the feudatory princes. “These Native States,” he wrote, “are the feudatory States of which the British Government is the Suzerain.”¹⁰ In India, he has further developed the policy, the British “have habitually interposed a zone of protected country between our own virtual or actual possessions and the territories of possible enemies.” Thus when the French force of the Nizam of the Deccan, “organized by the then lately deceased M. Raymond was disbanded by the armed diplomacy of Lord Wellesley in 1798, the Dominions of the Nizam became a protected State interposed between the possessions of the Marhatta powers and territories of which the East India Company was in one part the virtual and in another part the actual sovereign.”¹¹ It is always a guiding policy with every Protecting Power to exclude “other civilized powers” from rival influence. “The Protecting Power, by excluding other civilized powers, doubtless makes itself responsible for the administration of justice there to foreigners; and has a corresponding right to administer it except as against any Government refusing to acknowledge the protec-

⁹ Wheaton, *International Law*, IV Ed. p. 66.

¹⁰ Tupper, “*Our Indian Protectorate*,” p. 4.

¹¹ *Ibid.*, p. 20.

torate. The right has been assumed by British Orders in Council."¹²

This feudal theory, though assiduously developed to cover the minority administrations in Indian States is not found quite satisfactory even by favoured writers like Sir William Lee Warner and Sir Sydney Low. "It is the superficial resemblance confined to a very few of the petty chiefs, which makes the employment of the phrase 'feudatory' so dangerous to the rights of the great bulk of the protected princes of India."¹³ No doubt, the fifteen chiefs in the Central Provinces to whom adoption *Sanads* were granted in 1865 executed an agreement which commenced as follows:—"I am a Chieftain under the administration of the Chief Commissioner of the Central Provinces. I have now been recognized by the British Government as a feudatory subject to the political control of the Chief Commissioner or of such officer as he may direct me to subordinate myself to."¹⁴ King Edward VII's Coronation message is addressed to 'feudatories.' King George V's proclamation of 1911 contains also the term "feudatories." From 1919 onwards, in royal messages the phrase "Princes of India" occurs.

According to Sir W. Lee Warner, "no uniform or consistent practice has been observed by the Paramount Power in describing the States as a whole. On the contrary different language has been used in despatches and in treaties at different periods and even

¹²Holland, "*Lectures on International Law*," p. 80.

¹³Lee Warner, "*Native States of India*," II Ed. p. 394.

¹⁴Aitchison IV, Ed., vol. I pp. 445 ff.

in the same period; one ruler has been distinguished from another each case being treated on its own merits.”¹ Though Sir W. Lee Warner admitted generally the *internal sovereignty* of Indian States, under shelter of international conceptions, he was responsible for a view which was later fully developed by imperialistic Curzon and Lord Reading who was stressing the “hard fact” in his letter to the Nizam (27th March, 1926). According to Lee Warner, “Treaties and Grants held by the protected princes and the precedents of British Government’s dealings with them and with the protected princes who held no treaties or grants must be read as a whole, like the decisions of English Courts of Justice.”

Prof. Westlake, the eminent international lawyer, held that “the imperial right over the protected States appears to present a peculiar case of conquest, operating by assumption and acquiescence.”² In Statute 39 and 40 Vict. C. 46 these States were described as “several princes and States in India in alliance with Her Majesty.” The doctrine of Paramountcy developed by Prof. Westlake has got added weight by its adoption by the Indian States’ Committee. “There is a Paramount Power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Native States which is understood but not explained” (Lee Warner). Prof. Westlake also illustrates from the Proclamation of 15th January 1875 in re. the then Baroda Ruler, the development of the

¹ Lee Warner, pp. 387-388, vide also p. 405.

² Westlake, “*Collected Papers*”, p. 214.

imperial doctrine, "that the position of all the native princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property or of all drawers and endorsers of bills of exchange is to be ascertained from the latest decisions with regard to any of them."¹ In the *Manipur Case* (1891) the trial and punishment for breach of the conditions of loyalty were extended to subjects of a Native State, one of whom had indeed usurped the throne. The growth of the *modus vivendi* has been "gradual like that of the Indian Empire itself, that its particulars have in the same manner been imperceptibly shifted from an international to an imperial basis; and that the process has been veiled by the prudence of statesmen, the conservatism of lawyers; and the prevalence of certain theories about sovereignty."² Westlake regarded the rules which regulated the status of the Indian States as part of the constitutional law of the Empire.

Prof. Pollock observed that in cases of doubtful interpretation, the analogy of international law might be found useful and persuasive.³ Long ago Phillimore had stated that the principles of international justice are "binding, for instance, upon Great Britain in her intercourse with the native powers of India."⁴

Prof. Hall's view is found in a footnote where

¹ Ibid., p. 222.

² Ibid., p. 232.

³ *Law Quarterly*, XXVII, pp. 88, 89.

⁴ Phillimore, *International Law*, Vol. I, p. 32.

it is laid down that the "Indian Native States are theoretically in possession of internal sovereignty and their relations to the British Empire are in all cases more or less defined by treaty."¹ When Prof. Hall follows this up by stating that in matters not provided for by treaty a "residuary jurisdiction on the part of the Imperial Government is considered to exist," his view becomes open to criticism and appears unsupportable from an examination of treaties. To be valid such a jurisdiction must have its basis on grant-express or implied—or conquest; viewed from any point of view, this *ipse dixit* of the eminent international jurist, Hall, is unsound and baseless. Elsewhere, Hall writes, that the Indian States "form a class apart. With many of them treaties were entered into long ago which if no subsequent change in the relations so established had taken place, would warrant their being looked upon as independent save in the point of any capacity to maintain intercourse with any European or Eastern powers or any fellow Indian protected States."²

Sir Leslie Scott and four other eminent counsel engaged by the Princes stated as their opinion that as each "State was originally independent, so each remains independent except to the extent to which any part of the rulers' sovereignty has been transferred to the Crown. To the extent of such transfer, the sovereignty of the State becomes vested in the Crown; while all sovereign rights, privileges, and dignities not so transferred remain vested in the Ruler of the

¹ Hall *International Law*, VI Ed. p. 27.

² Hall, *Foreign Jurisdiction of the British Crown*, p. 206, n.

State.” In their view, the State and not the Crown has residuary jurisdiction. In fact, the pronouncements of the Crown themselves had recognized the sovereignty of the States. The *Sanads* issued after the Mutiny refer to “Governments of several princes and chiefs who now govern their own territories.” The proclamation of 19th April, 1875 in re. Baroda State announces that the Ruler is deposed from the “sovereignty” of the State. The Montagu-Chelmsford Report stresses “the independence of the States in matters of internal administration.”

The Indian States’ Committee held that the States are “*sui generis*, that there is no parallel to their position in history, that they are governed by a body of convention and usage not quite like anything in the world. They fall outside both international and municipal law.” The points of agreement between the Indian States’ Committee and the opinion of Sir Leslie Scott deserve to be noted:—

(a) The relationship of the States to the Paramount Power is a relationship to the Crown;

(b) The treaties made with them are treaties made with the Crown;

(c) These treaties are of continuing and binding force as between the States which made them and the Crown.

(d) It is not correct to say that “the treaties with the Native States must be read as a whole.” There are only forty States with treaties but the term in the context covers “engagements and *sanads*.”

(e) Cases affecting individual States should be considered with reference to those States individually,

their treaty rights, their history and local circumstances and traditions and the general necessities of the case as bearing upon them.

The opinion of two eminent German Professors, Dr. Viktor Bruns and Dr. Carl Bilfinger (available through the courtesy of Sir Mirza Ismail to the present author) is that "the Paramount Power of the British Crown is not incompatible with the independent status of the Indian States as international persons. States which are under the paramountcy of another State remain independent international persons so long as they are not incorporated in the other State." With great respect, here is a confusion between independence and sovereignty. In a different atmosphere the very error committed by the Government of India in the nineteenth century has been repeated here. The criticisms brilliantly made by Sir Henry Maine on March 22, 1864 apply with equal effect to the technically incorrect use of the term 'independent' by the eminent German jurists. "Sovereignty", argues out Sir Henry Maine, "is a term which in international law indicates a well-ascertained assemblage of separate powers and privileges. The rights which form part of the aggregate are specifically named by the publicists, who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to legislate and so forth. A sovereign who possesses the whole of the aggregate of rights is called an independent sovereign. It may perhaps be worth observing, that according to the more precise language of modern publicists, "sovereignty" is divisible, but independence is not. Although the expression

“partial independence” may be popularly used, it is technically incorrect.”

In *Duff Development Company vs. Government of Kelantan*¹ it has been held that “for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power, the control for instance of foreign affairs may be completely in the hands of a Protecting Power; and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing the loss of the position of a sovereign power.”

The case in *R. vs. Christian*² is relevant for the observations of Innes, C. J. The South African Supreme Court held that high treason can be committed against a State which possesses internal sovereignty even though its external powers may be restricted to some extent and that South Africa, the Mandatory Power, did possess sufficient *majestas* in South-West Africa,—the mandated territory—to sustain the charge. Innes, C. J. made the observation that “curtailment of external sovereignty and dependence upon another power are not in themselves fatal to the sovereignty of the State concerned.” Further it was also stated that it was well “to bear in mind that *majestas* is exercised in two

¹ 1924 A. C. 797 at 814.

² 1924 S. A. L. R. (A. D.) 101. For a discussion of the case vide *Transactions of the Grotius Society*, London, Vol. 23, p. 89. In *Nelson vs. Braisby*, (1934 N. Z. L. R. 559). Myers, C. J. of New Zealand, follows the above South African Case.

directions and has a dual aspect; internally it relates to the power of making and enforcing laws, externally to freedom from outside 'control.....' This distinction between internal and external sovereignty is inherent, and of the two the internal is the more important, for a law-making and a law-enforcing authority is very essential to the very existence of a State." Or again, as was more satisfactorily put in the same case by De Villiers. J. A. "It is said the Union Government has no *majestas* for it is limited by the terms of the mandate. Such limitation in my opinion does not deprive the Union of sovereignty over South-West Africa. For the limitation of the exercise of sovereign rights in certain directions does not deprive the sovereign of *majestas*, so long as there is no abdication of sovereignty in favour of another." The bearing of these observations on the sovereign status of Indian States is direct.

The observations made by Reilly, J. in 53 M. 968 have an equally direct bearing. It fell to be decided in that case¹ whether Gadwal *Samasthanam* was in any sense a sovereign State or a foreign State for the purpose of § 84, Civil Procedure Code (India Act V of 1908). Concepts of political sovereignty are varying but the fundamental characteristics of legal sovereignty have remained well ascertained. Reilly, J. laid down the following tests of sovereignty in a legal sense:—Any State which "has preserved any degree of sovereignty—and various attributes of sove-

¹ *Kothakota Venkataramireddi vs. Sri Maharaja Seetha Ram Bhupal Rao and others*, 53 M. 968.

reignty may have been ceded to their suzerains by different States—must have at least three characteristics :—

(a) The people of the territory concerned must owe allegiance to the ruler of the supposed State and in the term 'Ruler' I include any person in whom or body in which the sovereign power resides:

(b) The laws enforced in the State must be the Ruler's laws, either made or recognized by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority.

(c) And those laws must be enforced by his courts—viz., courts deriving their authority from him and not subject to the judicial control of any outside authority."

The eminent Indian jurist, Sir P. S. Sivaswamy Aiyar has described the status of the Indian States thus:—"The precise category to be assigned to the Indian States in International Law is to the academic lawyer as fascinating as it is baffling. The fact is that for various purposes including the administration of justice the Indian States are treated as foreign territory beyond the jurisdiction of the British Indian Courts. They are in other aspects subject to the suzerainty of the British Government with all the practical implications and corollaries. The body of law applicable to them can at best be spoken of only as quasi-international law. To the rulers themselves and their counsel the letter of the treaties may possess a predominant interest but to the practical statesman and to the subjects of the Indian States, the vital issue is what are the rules and usages by which the relations of the British Government and the States are and have

been governed.”¹

So far as the Government of India Act (1935) is concerned, § 311 defined an Indian State following the English Interpretation Act of 1889 (§ 18) thus:—“Indian State” includes any territory, whether described as a State, an Estate, a Jagir or otherwise, belonging to or under the Suzerainty of His Majesty and not being part of British India. It is significant that the term “alliance” familiar to readers of earlier Acts of Parliament, is not found in the Government of India Act (1935). The word found instead—to describe the *nexus* between the Crown and the States is “relationship” (*vide* §3). As Prof. J. H. Morgan pointed out the new term “relationship” may excite “doubt but it cannot provoke dispute.” The term “sovereignty” with reference to the status of the Indian States which occurs in the Instrument of Instructions and the Draft Instrument of Accession appears only once in the Act in another context to describe the authority of His Exalted Highness the Nizam over Berar (§ 47). Further, the term used in connection with accession is “Instrument” and not “Treaty.” The validity of Instruments of Accession to be executed by the Indian States, as distinct from their scope and interpretation by the Federal Court cannot be subject to question in Courts since under § 6 (9) “all Courts shall take judicial notice of every such Instrument and acceptance.”

Is the term “*Suzerainty*” correct to describe the

¹ Foreword of Sir P. S. S. Aiyar to Dr. Mehta’s “*Lord Hastings and Indian States*,” p. VII.

relations between the Crown and the different classes of Indian States? What is meant by *Suzerainty*? The term has come in for examination in Courts of law which in the main have followed the definitions of textbook writers of international Law. While construing the definition of the Indian State in the English Interpretation Act of 1889, Bargarve Deane, J. has pointed out that "*Suzerainty* is a term applied to certain international relations between two Sovereign States whereby one, while retaining a more or less limited sovereignty acknowledges the supremacy of the other. Such a relation may be either in the nature of a fief or conventional, viz., by some treaty of peace or alliance in contrast with the fief, which is a sovereignty granted by a lord paramount over some defined territory accompanied with an express grant of jurisdiction."¹

Prof. Westlake reminds scholars that the word "*Suzerainty*" is found used in the Treaty of Berlin to express the relation of the sublime *Porte* to the principality of Bulgaria, which it created. That was the proper term in the Middle Ages for the relation of a feudal superior to his vassal, while "sovereignty" was more properly superiority in jurisdiction, the highest court in a territory which was distinct for judicial purposes being called a *Cour Souveraine*. A modern description of a State as subject to *Suzerainty* does not by itself shut it out from any of the rights that were enjoyed by the States of the Holy Roman Empire, which were internationally accepted as sovereign States, and

¹ *Statbam* vs. *Statbam* etc., 1912, P. 92 at pp. 95-96

were so-called, while they recognized the Emperor as their *Suzerain* power. How many of these rights it is intended that the State in question shall enjoy must be ascertained from the more detailed provisions of its constitution.”¹

Prof. Hall formulates that a “State under the *suzerainty* of another being confessedly part of another State, has those rights only which have been expressly granted to it, and the assumption of larger powers of external action than those which have been distinctly conceded to it is an act of rebellion against the Sovereign.”²

Wheaton gives the examples of the principalities of Moldavia, Wallachia, and Servia, under the *Suzzerainete* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between these two Powers, confirmed by the Treaty of Adrianople, 1829.³

Fiore defines a treaty of *Suzzerainty* as one concluded between a civilized and an uncivilized State in which the former imposes on the latter (which accepts it) every obligation of mediate and immediate dependency in the exercise of its rights of sovereignty within the State.

According to Oppenheim, modern *Suzzerainty* involves only a few rights of the *Suzerain* State over the vassal State which can be called constitutional rights. The rights of the Suzerain over the vassal States are

¹ Westlake “Collected Papers”, p. 90.

² Hall, “*International Law*” VI Ed. p. 29.

³ Wheaton, IV Ed. by Altay: p. 55.

principally international rights of whatever they may consist. *Suzerainty* is by no means sovereignty. *Suzerainty* is a kind of international guardianship, since the vassal State is either absolutely or mainly represented internationally by the *Suzerain* State. This is the position of the Indian vassal states of Great Britain which have no international relations.”¹

An examination of the above definitions by text-writers leads to the conclusion that “having regard to its various applications in practice, the term “*Suzerain*” would scarcely seem to imply any definite relation in law, whilst the question of capacity would appear to depend on the facts of each particular case.”² Though its legal implications appear to lack precision, the following political characteristics of *Suzerainty* pointed out by Sirdar D. K. Sen flow out of the definitions of eminent international text-writers:—

(a) The Suzerain State is under an obligation to protect the vassal State;

(b) The vassal State is under an obligation to observe the following conditions:—

- (i) It must be loyal and faithful to the Suzerain; *fiducia*
- (ii) It must render service in time of war; *Servitium*.
- (iii) The title of the vassal state is not original; it is derived from the *Suzerain* state.
- (iv) In almost all cases, the vassal State pays

¹ Oppenheim, *International Law*, V Ed., Vol. I, p. 165.

² Pitt Cobbett's “*Leading Cases in International Law*”, V Ed. Vol. I, p. 55.

tribute to the Suzerain.

- (v) In all its external affairs, the vassal State is governed and guided by its *Suzerain*.¹

Sirdar D. K. Sen who has generally followed all authorities with discrimination has arrived at an astounding division of international persons into persons *sui juris* and *alieni juris* to afford a scaffolding to shove in the Indian States. The status of Indian States is not international in the strict sense. Violence would be done to International Law if political societies with internal sovereignty alone were to come in as international persons of a particular brand. Standards of weights and measures should never be lowered. Municipal law has given us a good analogy in quasicontract.² Oppenheim, Phillimore, Wheaton and Hall can be only reconciled with styling this status of Indian States as *Quasi-International*.

The implication that the title of the vassal State is derived from the *Suzerain* State is manifestly inapplicable to States like Hyderabad, Baroda, Gwalior, Kashmir and Travancore. But in cases of conquest and retrocession or regrant this implication is applicable. These Indian states have a status which is *quasi-international* in character. Looked at internationally "from the outside by foreign powers, they are British. Looked at, however, from within they are not British. Parliament which has full legislative power over all British territory cannot legislate

¹ Sirdar D. K. Sen, *Indian States*, pp. 36-37.

² Jackson, *History of Quasi-Contract*.

for the Indian States.”¹

The latest amendment of the definition of “*Indian State*” in § 311 of the Government of India Act (1935) is very significant. The deletion of the term “*Suzerainty*” may satisfy the hypersensitive States; but the shifting of the status to *depend purely on recognition by His Majesty* has reduced all States to one level. It is presumed that this simplified definition will not disturb the existing relationship of *Suzerainty* as between certain States and their subordinate Jagirs. The amended definition in the Act runs as follows:—

“Indian State” means any territory, not being part of British India, which His Majesty recognizes as being such a State, whether described as a State, an estate, a Jagir, or otherwise.”²

Constitutional Characteristics

Indian States are political communities. This constitutional position can be taken as having been recognized all round. The following treaty-provisions abundantly illustrate this view. Art. 9 of the Treaty with Udaipur, dated 13th January, 1818 runs as follows:—“The Maharana of Oudeypore shall always be absolute ruler of his own country, and the British jurisdiction shall not be introduced into that principality.” The Proclamation of war against Coorg dated 15th March, 1834 notified that “a British army is about to invade the Coorg territory.” Art. 9 of the Treaty with Bikaner dated 9-3-1818 states that “The

¹ *British Year Book of International Law*, 1930, pp. 55-56.

² 3 and 4 Geo. VI, Ch. 5.

Maharajah and his heirs and successors shall be absolute rulers of their country and the British jurisdiction shall not be introduced into that principality.” Under Article 3 of the Treaty with Alwar dated 19th December, 1803, “the Honourable Company shall not interfere with the country of the Maha Rao Raja nor shall demand any tribute from him.” Article 9 of the Treaty with Jodhpur dated 6th January, 1818 assures that “the Maharajah and his heirs and successors will remain absolute rulers of their own country and the jurisdiction of the British Government shall not be introduced into that principality.” Likewise, Art. 9 of the Treaty with Bhopal of 1818 states that “The Nawab and his heirs and successors shall remain absolute rulers of their country and the jurisdiction of the British Government shall not in any manner be introduced into that principality.” Art. 8 of the Treaty with Jaipur dated 2nd April, 1818 runs as follows:—“The Maharajah and his heirs and successors shall remain absolute rulers of their territory and their dependents according to long-established usage; and the British Civil and Criminal Jurisdiction shall not be introduced into that principality.”¹ In fact, Art. VI of the Treaty with the Gaekwar of 8th March, 1802 clinches the position: “For the cultivation and promoting the permanency of the good understanding between the two States, there shall be a constant good correspondence kept up between them, and agents reciprocally appointed to

¹ Aitchison, Vol. III, IV Ed., p. 105. The clauses in the treaties, engagements and sanads cited in this work have been extracted from Aitchison's Volumes.

reside with each.” Again in a letter from the Governor of Bombay to H. H. the Gaekwar dated 8-2-1841, one reads that the “the British Government in no way wishes to interfere in the internal administration of Your Highness’ territory, of which it acknowledges you to be the sole Sovereign.”¹ Further, in the treaty with Jammu and Kashmir dated 16th March, 1846, it is stated in Art. IX that “The British Government will give its aid to Maharajah Gulab Singh in protecting his territories from external enemies.” The Instrument of Transfer of the Benares State expressly declares that “the Family Domains of the Rajas of Benares.....should be constituted as a State under the suzerainty of His Majesty.”

The territory of Indian States is not British territory.² The certificate which the India Office gave to assist the Court in assessing the status of the Gaekwar of Baroda as a foreign Ruling Prince illumines this position—“The Gaekwar of Baroda has been recognised by the Government of India as a ruling chief governing his own territories under the *suzerainty* of His Majesty. He is treated as falling within the class referred to in the Interpretation Act, 1889, § 18, Sub-Section 5, as that of native princes or chiefs under the *suzerainty* of His Majesty exercised through the Governor-General of India. The British Government does not regard or treat His Highness’ territory as being part of British India or His Majesty’s dominions, and

¹ Aitchison, Vol. VIII, IV Ed., p. 89.

² *Empress vs. Keshub Mahajan and others*, 8 C. 98; F. B. The territory of Mohurbhunj is not within the limits of British India.

it does not regard or treat him or his subjects as subjects of His Majesty.

But, though His Highness is thus not independent, he exercises as Ruler of his State various attributes of sovereignty, including internal sovereignty which is not derived from British law, but is inherent in the Ruling Chief of Baroda, subject, however, to the suzerainty of His Majesty, the King of England....."¹

In this connection reference may be made to the remarks of Lord Halsbury regarding jurisdiction over railway territory of States. In the particular case, their Lordships were of opinion that "the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority, therefore, to execute any criminal process must be derived in some way or another from the sovereign of that territory."² Questions of jurisdiction in Cantonment areas, Railways, and Residency bazaars will be examined while studying the growth of powers of the Paramount Power.

The subjects of Indian States are not British subjects. In fact, Kashmir has defined its State nationality by passing a law that no one who has settled in Kashmir after 1886 is considered a hereditary subject of the state. The question of the status of the subjects of Western India Agency was raised in the House of Commons through a question on 19th November 1928 when the Under-Secretary of State for India

¹ Certificate extracted in *Stattham vs. Stattham etc.*, 1912, P. 92.

² Lord Halsbury in *Muhammad Yusuf-ud-Din v. Queen Empress*, 1897, 24 I. A., 137.

answered that the people of the territories included in the Western India States Agency "are not considered British subjects but owe allegiance to the Rulers of the various States and no question arises, therefore, of their having rights of representation as British subjects."

Some Indian States have their legislation, administration, and Civil and Criminal Jurisdiction. As the Joint Parliamentary Committee put it, "the more important States enjoy within their own territories all the principal attributes of sovereignty, but their external relations are in the hands of the Paramount Power. The sovereignty of others is of a more restricted kind and over others again the Paramount Power exercises in varying degrees an administrative control."¹

The Laws of England do not apply to the inhabitants of the States. The King in Parliament is precluded from legislating for the Indian States. The Secretary of State for India's letter dated 28th September 1927 to the Secretary-General of the League of Nations relating to the ratification of Conventions of the International Labour Organization by Indian States, makes this abundantly clear:—"The exact relations between the various States and the Paramount Power are determined by a series of engagements and by long-established political practice. These relations are by no means identical, but broadly speaking, they have this in common that those branches of internal administration which might be affected by decisions reached at International Labour Conferences are the concern of the

¹ J. P. C. Report, Vol. I, Part I, p. 2.

Rulers of the States and are not controlled by the Paramount Power. The legislature of British India, moreover, cannot legislate for the States nor can any matter relating to the affairs of a State form the subject of a question or motion in the Indian Legislature."

Indian States are outside the jurisdiction of the British Courts. Within the domain of private international law these States are to be regarded as "separate political societies and as possessed of an independent Civil, Criminal, and Fiscal Jurisdiction."¹

At this stage the law relating to property in Cantonments in Indian States may be briefly examined. The following judicial decisions relating to Cantonments may here be examined. In *Triccam Panachand vs. B. B. & C. I. Ry. Company*² the Cantonment of Wadhwan was held included in "British India" following the document of cession which gave it "in perpetuity.....for the purpose of establishing a British Station." The sound view is to hold the civil station as '*not part of British India*' since the power and jurisdiction exercised by the Political officer are such as the Foreign Jurisdiction Act (XXI of 1879) applies to.³ Thus, Secunderabad fixed upon as a Cantonment for the British Government under Art IV of the Hyderabad Treaty of 1798 was held by the Calcutta High Court as the property of the Nizam and it was not considered to be within British India. The reply of the Foreign office on the factum was also got in the case.

¹ *Sirdar Gurdial Singh vs. Rajah of Faridkote*, 1894, A. C. 670. Vide also K. R. R. Sastry's *International Law*, pp. 38-39.

² 9 B. 244; but 14 Bom. L. R. holds contra. 876.

³ *Queen Empress vs. Abdul Latif*, 10 B. 186.

(*Hossain Ali Mirza vs. Abid Ali Mirza and others*).¹ This position is also fortified by later decisions.²

Here as elsewhere the Paramount Power has successfully clutched at jurisdiction. The Paramount Power has expressed that it "has no proprietary right over the soil but that so long as the Cantonment is maintained the land assigned to the Cantonment should be under their control as absolutely and completely as if it were part of British territory." The following principles may be justified as applicable to this branch of law:—

- (1) The proprietary and sovereign rights belong to the State.
- (2) Jurisdiction over this area is being exercised by the British officer as a "political right."
- (3) *A fortiori* the right to tax the non-exempted classes in the Cantonment areas belongs to the Indian State and not to the Paramount power. Sirdar K. M. Panikkar has ably discussed this part of the law with a good deal of inside knowledge.

The principle of State-Sovereignty over air³ has been recognized so far as air sovereignty of Indian States is concerned. This is of course subject to the necessary limitations of international relations and the paramount needs of defence. The Air Navigation

¹ 21 C. 177.

² 105 I. C. 565 (2); and 57 I. A. 339.

³ Vide Art. I. International Convention for Aerial Navigation 1919 and the Air Navigation Act of 1920 (England). Also Carriage by Air Act, 1932, 22 and 23 Geo. V, Cap. 36. Air Navigation Act, 1936. 26 Geo. V and I Ed., VIII C. 44.

Agreement with some Indian States is a striking instance of the new procedure in matters affecting Indian States and the Paramount Power.

Treaties of the Crown with third States "are not applicable *ipso jure* to the territory of the Indian States, but only if in these Treaties the application to these States is expressly agreed upon."¹ The Crown has itself recognized this aspect of the status of Indian States in notes addressed to third States. The following passage is extracted from a letter of the Marquess of Salisbury (Secretary of State for Foreign affairs) to the Marquess of Dufferin, (British Ambassador in Paris) dated April 25, 1896:—

"The protected States of India are not annexed to, nor incorporated in, the possessions of the Crown. The rulers have the right of internal administration subject to the control of the Protecting Power for the maintenance of peace and order and the suppression of abuses. The latter conducts all external relations. The position has been defined as that of subordinate alliance. It has, however, never been contended that if those estates had had pre-existing Treaties with Foreign Powers the assumption of Protectorate by Great Britain would have abrogated those Treaties. It could not have had, and in no case has had, such consequences."² Examples are furnished by the Treaties entered into by the State of Jammu and Kashmir with Tibet and China at the time of the Conquest

¹ This writer is indebted to the correct exposition of these legal results of status of Indian States by Professor Viktor Bruns and Carl Bilfinger.

² British and Foreign State Papers, Vol. 89, p. 1053.

of Ludakh by Maharaja Gulab Singh. These treaties are now enforced through the medium of the Crown.

It has been stated in books written by distinguished publicists connected with Indian States that Rulers of Indian States are sovereign enjoying ex-territoriality. Put in such a form, the statement is too wide. The Law of Nations "gives a right to every State to claim so-called ex-territoriality, and therefore exemption from local jurisdiction, chiefly for its Head, its diplomatic envoys the men-of-war and its armed forces abroad."¹ This branch of law has for the first time had in 1938 the benefit of the decision of a Supreme Tribunal in England. Lord Atkin has thus summed up the two distinct immunities appertaining to foreign sovereigns:—

1. "The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
2. The second is that they will not by their process, whether a sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in pos-

¹ Oppenheim, Vol. I, IV Ed., pp. 280-281. Vide also *Migbell v. Sultan of Johore*, 1894, 1 Q. B. 149. *Hullet v. King of Spain*, 1828, 1. D. and Cl. 174. "*The Parlement Belge*," 1878 L. R. 5 P. D. 197. *The Cristina*, 54 (1938) T. L. R. 512-1938 A. C. 485.

session or control. There has been some difference in the practice of nations as to possible limitations of this second principle—whether it extends to property only used, for the commercial purposes of the sovereign or to personal private property. In this country, it is in my opinion well settled that it applies to both.”¹

So far as the Indian States are concerned, it is well established that while travelling abroad, these princes enjoy the status of a foreign ruling prince and are exempt from municipal jurisdiction.² But this rule of international law which is based on the principle of “absolute independence of the sovereign to recognize any superior authority” cannot be applied to the Rulers in India since they are subordinate to the authority of the Crown. The rule of International Law has been modified by the provisions of § 86, Civil Procedure Code (V of 1908) under which alone the Rulers can claim exemption. Under § 86, a Ruler cannot be sued without “the consent of the Crown Representative” and no execution can be issued against him without such consent. This consent shall not be given unless the Prince,

- (a) has instituted a suit in the Court against the person desiring to sue him or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court or,

¹ *The Christina*, 54 (1938) T. L. R. 512 at p. 513.

² *Statham v. Statham* etc., 1912, p. 92.

- (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

It may be here noted that in cases of grave misconduct of a prince, the Crown under its prerogative powers has punished Rulers. The modern practice is after trial by a Commission consisting of a judicial officer not lower in rank than a High Court judge and four other persons of high status of whom not less than two will be the ruling princes. As Lord Curzon put it "in cases of flagrant misdemeanour or crime, the Viceroy retains, on behalf of the Paramount Power, the inalienable prerogative of deposition, though it is only with extreme reluctance and after the fullest enquiry and consultation with the Secretary of State that he would decide to exercise it."¹

¹ *Leaves from a Viceroy's Note Book*, Curzon, p. 41.

CHAPTER V

IMPLICATIONS OF PARAMOUNTCY

Before examining the ubiquitous implications of Paramountcy, a historical retrospect of the growth of Paramountcy is necessary. Paramountcy is "the conveniently compendious word that has been given to describe the relations between the States and the British Government in India."¹ Sir W. Barton, a well-known Political Officer has unmasked the disguise when he correctly laid down that "paramountcy is the outcome of military supremacy over the great sub-continent of India, an inevitable corollary of a military protectorate." Prof. M. Ruthnaswamy, a reputed student of Indian Politics, has well pointed out that "the idea of paramountcy is an original political idea forged by the British in the factory of experience. There is nothing quite like it known to history or to international law." "The Indian State is neither a Vassal, nor a Protectorate, nor a feudatory." The quest has to be left at that point without a definition of Paramountcy and Prof. Ruthnaswamy has to content himself in *describing* Paramountcy *a la mode* of the Butler Committee.

The historical analysis of the ideas that have gone to the making of this theory has been so correctly

¹ M. Ruthnaswamy. *British Administrative System in India*, p. 605.

done by Prof. Ruthnaswamy that it deserves repetition. During the early Company days the powers of the land required the military help of the Company. "This military help was given on condition of regular payment of money. When the country powers defaulted, they had to accept control and supervision of their government by officers of the Company stationed at their courts. Still further security was furnished by the permanent stationing of Company's military forces in the territory of the States to guard them against internal disturbance or to defend them against neighbours. Thus the theory of the subsidiary system was built up. Another condition of the alliance was that the states should have no international dealing with foreign states or with other States in India save with the consent of the British Government.....The facts of the international situation and of the internal situation in each of the States gave the British the opportunity, the reason, the hints which allowed them to build up the theory of those relations between them and the states."¹ Later on, the issue is clinched thus:—"An analysis of the views of the great Rulers of India, of Warren Hastings, Lord Cornwallis, the Marquess of Wellesley, the Marquess of Hastings, Lord Dalhousie, Lord Canning and Lord Mayo shows that it was not theories of political or of international law that determined the view taken and enunciated by these statesmen but the facts and reactions of Indian circumstances."²

¹ M. Ruthnaswamy *British Administrative System in India*, p. 604.

² *Ibid.*, p. 605.

The Ring-fence policy of the much-maligned Warren Hastings, the Subsidiary System of Wellesley, the Subordinate Co-operation under Lord Hastings, Lord Curzon's policy of patronage and "intrusive surveillance" and the period of Cordial Co-operation since 1905 indicate distinctly the well-marked stages in the policy followed in reference to these States.¹

The *earlier* treaties contain the following among other phrases "mutual amity, friendly co-operation, reciprocal obligation, alliance, true friendship, good understanding, perpetual friendship, firm alliance." (*Vide* Art. I Treaty with Nizam, 12-11-1766; Art V Treaty with Baroda, 8-3-1802; Art IX Treaty with Travancore of 1805; Art I Treaty with Gwalior, 30-12-1803). The character of independence possessed by the States prior to 1813 is clear for example from Art 14 of the Gwalior Treaty of 1803 which runs as follows:—"In order to secure and improve the relations of amity and peace hereby established between the Governments, it is agreed that accredited *ministers* from each shall reside at the Court of the other."

The shifting from an international to an imperial plane is clearly indicated from the administration of Lord Hastings. Dr. Mehta correctly described this clever change when he stated that Lord Hastings has removed the problem of the Indian States "from the province of the international lawyer and transferred it to that of the practical statesman and the political philosopher where it has rested ever since."² Treaties

¹ Sydney Low: "*Indian States and Ruling Princes*," pp. 22-23.

² Dr. Mehta: *Lord Hastings and the Indian States*, p. 262.

of the time of Lord Hastings have had introduced the obligation of "acting in Subordinate Co-operation with the British Government and acknowledging its supremacy." (*Vide* e.g., Art III Treaty with Udaipur dated 13-1-1818; Art III Treaty with Jodhpur, dated 6-1-1818; Art III Treaty with Bikaner, dated 9-3-1818).

The forty years from 1818-1858 witness the "growth and establishment of the imperial idea." The Indian States have lost "the character of independence, not through any epoch-making declaration of British Sovereignty, but by a gradual change in the policy pursued towards them by the British Government. Encountering the ambition of some of its neighbours and the internal anarchy of others, and the efforts of France or of French adventurers to build on those elements a power rivalling its own, that government was early led to see that its own security, even within the limits which it had from time to time attained, was to make for itself among the States of India such a preponderant position as Charles V, Louis XIV, and Napoleon, had essayed or were essaying with less justification to make for themselves among the States of Europe."¹

Active administrators and shrewd political agents had a fascinating temptation to reduce "the enfeebled rulers to further dependence."² The Marquess of Hastings wrote in his Private Journal (on Feb. 1, 1814):—"In our Treaties with them (the Princes of India) we recognize them as independent Sovereigns. Then we

¹ Westlake, *Collected Papers*, p. 205.

² Sydney Low, "*Indian States and Ruling Princes*", p. 30.

send a Resident to their Courts. Instead of acting in the character of ambassador, he assumes the functions of a dictator; interferes in all their private concerns, countenances refractory subjects against them and makes the most ostentatious exhibition of his exercise of authority.”¹

Political practice reduced all the States “to conform to a single type” by extending the protecting powers of the Paramount Power. The Baroda Case (1873-75), the Manipur Case (1891-1892), the Hyderabad Case (1926), and the Bharatpur Case are significant landmarks. The conditions of the Proclamation of 13th January, 1875 were never to be found in any prior treaty with the Gaekwar. Removal by administrative order of any person whose presence in the State may seem objectionable—as in the arrest, trial, and sentence of Jubraj of Manipur—could never be justified as an “unquestioned right” as Sir W. Lee Warner would have it, but only as an “act of prerogative justified by necessity rather than a legal power vested in the Government of India.” (Sydney Low). The Berar Case led to the enunciation by Lord Reading in 1926 of the doctrine of Sovereignty of the British Crown as being supreme in India under which “no Ruler can justifiably claim to negotiate with the British Government on an equal footing.” The recent Bharatpur Case has left behind the query, “Can mere financial extravagance justify the intervention by the paramount Power?”

¹ *The Private Journal of the Marquess of Hastings*, pp. 26-27.

Indian States' Committee on Paramountcy

It has become necessary to state the doctrine of Paramountcy as visualized by the eminent international lawyer, Prof. Westlake, whose views have been followed with deference by the Indian States' Committee. Sir W. Lee Warner had written in his authoritative work thus:—"There is a paramount power in the British Crown of which the extent is wisely left undefined. There is a subordination in the Indian States [which is understood but not explained. The Paramount Power intervenes on grounds of general policy, where the interests of the Indian people or the safety of the British power are at stake. Irrespective of those features of Sovereign right which Indian States have for the most part ceded or circumscribed by treaty, there are certainly some of which they have been silently but effectually deprived."¹ On this intriguing statement, Prof. Westlake commented that "a paramount power such as this is defined by being, wisely or not, left undefined. That to which no limits are set is unlimited. It is a power in India like that of the Parliament in the United Kingdom, restrained in its exercise by considerations of morality and expediency, but not bounded by another political power meeting it at any frontier line, whether of territories or of affairs."² The Indian States' Committee would not improve upon this but stated that "paramountcy must remain paramount; it must fulfil its obligations defining or adapting itself according to the shifting necessities of the time

¹ Lee Warner, *The Protected Princes of India*, pp. 37-40.

² Westlake, *Collected Papers*, p. 212.

and the progressive development of the States.”

According to the Indian States' Committee, Paramountcy is based upon “treaties, engagements, and Sanads supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State embodied in political practice.” It was ably advanced by Sir Leslie Scott that “mere usage cannot vary the treaties or agreements between the States and the Crown” for no agreement “can underlie usage unless both the contracting parties intend to make one.” It was also argued that usage is *per se* “sterile” in municipal law since it creates neither rights nor obligations. If by usage was meant practice commonly followed by independent nations, it was answered that Indian States are protected by the Crown. No usage in an international sense can emerge as by the very terms of the basic agreement with the Crown, the Indian States “have given up the rights of diplomatic negotiation with and of war against or pressure upon other Indian States, and have entrusted to the Crown the regulation of their external relations in return for the Crown’s guarantee that it will maintain in their integrity their constitutional rights, privileges, and dignities, their territory and their throne.” Political practice, Sir Leslie Scott stated, “as such has no binding force, still less individual precedents or rulings of the Government of India.” From a legal point of view, the efficacy of sufferance is no greater than usage. Though the Indian States’ Committee dissented from these views of the eminent counsel, they “did not examine the legal position at any length.”

The basis of this *imperial right* is essentially *poli-*

tical and any effort at reconstructing these legal-cum-political bases will always remain vulnerable. The Princes who were still pressing for a definition of Paramountcy were authoritatively answered thus by the Secretary of State for India in the House of Commons: "In ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in his dealings with the States. No successful attempt could be made to define exactly the rights of the Crown's Representative to intervene."¹

The activities of the Paramount Power are concerned with the following departments:—

I. External Affairs

For international purposes, State-territory is in the same position as British territory and State-subjects are in the same position as British subjects. Surrendering foreigners in accordance with the Extradition Treaties of the Paramount Power, co-operation with the Paramount Power to fulfil its obligations of neutrality, assistance to enforce the duties of the Paramount Power in relation to suppression of slave trade, duty not to injure any subject of a foreign power within its territory—all these obligations are to be respected by the States.

II. Interstatal Relations

With regard to interstatal relations the States

¹ House of Commons Debates—dated 20th March 1935, p. 1236.

cannot cede, sell, exchange or part with their territories to other States without the approval of the Paramount Power.

III. Defence of India

The Paramount Power is responsible for the defence of both British India and the Indian States and as such has the final voice, in all matters connected with defence, including establishments, war-materials, communications etc. It follows that "the Paramount Power should have means of securing what is necessary for strategical purposes in regard to roads, railways, aviation, posts, telegraphs, telephones, and wireless, cantonments, forts, passage of troops and the supply of arms and ammunitions."

IV. Occasions of Intervention

Intervention for the benefit of the Prince, for benefit of the state, and for benefit of India as a whole has been claimed as a right of the Paramount Power. Intervention for the benefit of the Prince included recognition of succession by the Paramount Power; since 1917, in case of natural heir, an exchange of formal communication between the Prince and the Crown Representative is sufficient. The Paramount Power has the right to decide cases of disputed succession. Adoption of an heir requires the consent of the Paramount Power. The obligations of the Paramount Power during the minority regime also remain. The theory of feudal overlordship, it is expected, will no longer be set up. The surrendering of the rights of

coinage during the minority regimes in Bikaner and Alwar could not be justified on equitable grounds since a guardian or a trustee would be guilty of breach of trust if the existing rights of the ward or beneficiary were given up during minority. None the less culpable was the exploitation of minority regimes in Cutch (1879) and Patiala (1904) for getting salt agreements. New rules of minority administration have, however, been framed by the Government of India in 1917.¹

Intervention for the benefit of the State may arise out of *gross misrule*, disloyalty, serious crime or existence of barbarous practices. For gross misrule intervention must take place in the form of deposition, curtailment of authority or appointment of officers to supervise. It has been held a condition precedent to have the report of a Commission. A Ruler guilty of disloyalty or of a serious crime courts the intervention of the Paramount Power. Intervention by the Paramount Power for suppression of *Sati*, infanticide, torture and other barbarous punishment can be justified on broad humanitarian grounds.

Intervention for "settlement and pacification" has had a laboured support by Sir H. S. Maine in his famous Kathiawar Minute of 1864. It is essentially *political* on a par with the doctrine of Balance of Power in international relations.

Intervention for the economic good of India has had a mixed reception in Indian States.

¹ Vide Resolution No. 1894-IA. F. and P. Dept. dated August 27, 1917.

V. Certain Other Cases

Under this caption, the Indian States' Committee examines the intervention of the Paramount Power which has introduced the jurisdiction of its officers in cases of .

- (a) Troops in Cantonments
- (b) Other special areas in Indian States.
- (c) European British subjects.
- (d) Servants of the Crown in certain circumstances.

At this point, the question of 'residuary jurisdiction' as alleged to exist with the Paramount Power falls to be examined. Prof. Hall has made an astounding observation in a footnote¹ that in matters not provided for by Treaty, a "residuary jurisdiction" on the part of the Imperial Government is considered to exist. Sir W. Lee Warner has also developed the theory of a "residuary jurisdiction" of British Government in all matters. The shadows and repercussions of Paramountcy which is undefined permeate everywhere. The argument in reply by Sir Leslie Scott is based on International Law:—"The Crown has no sovereignty over any State by virtue of the prerogative or any source other than cession from the Ruler of the State." This argument gets added support from the preamble to the Foreign Jurisdiction Act, 1890. The extra-territorial jurisdiction exercised by the British Crown within the territories of foreign States is founded upon "Treaty, capitulation, grant, usage, sufferance

¹ Hall, *International Law*, VI Ed., p. 27.

and other lawful means." If the stand were to be taken on consent, it may be expressed in various ways. Per Dr. Lushington in *Laconia*,¹ consent may be expressed by (a) "Constant usage, permitted and acquiesced in by the authorities of the State; (b) active assent; (c) or silent acquiescence where there must be full knowledge."

Such facts as are available are sufficient to torpedo fully any acquiescence by States. In 1863, the Bhopal Ruler protested against the exercise of Jurisdiction by the representative of the British Government over British subjects resident in the principality of Bhopal and relied very properly on Art. 9 of the Bhopal Treaty of 1818 whereby "the Jurisdiction of the British Government shall not in any manner be introduced into the principality." An unsuccessful attempt at taking away the jurisdiction of the Court of Travancore in 1871 met with the repudiation of John D. Mayne who put the case of Travancore thus:—"Parliament is as incapable of taking away the powers of a Court as it is of dealing with the Courts of France." Legally, the position can be successfully maintained that the jurisdiction exercised by the representatives of the Paramount Power in cantonment tracts, residency areas, and railways is in excess of the grant or cession. The fiscal hardship that can be caused by the growth of big centres of trade in residency bazaars is illustrated by the residency bazaars in Indore which could not be in any view legally justified under Art. 14 of the Indore

¹ Moo. P. C. N. S. 183.

Treaty of 1818.¹ In law, Paramountcy cannot be a source of the extra-territorial jurisdiction of the Crown. As Piggott has tersely put it, "the exact position involved in extra-territoriality may be shortly stated thus:—Such powers alone as are surrendered by the Sovereign of the Country can be exercised by the Sovereign of the Treaty Power (viz., the Sovereign to whom the Grant is made); all those powers which are not surrendered are retained."²

Criticism of Holdsworth's Theory

At this stage, a fair and critical examination of Holdsworth's theory of Paramountcy has to be made. Sir William Holdsworth defends the theory propounded by the Indian States' Committee of which he was a distinguished member—that "the Crown cannot cede its rights and duties as Paramount Power to any other State."³ Further, he postulates that since "the usage accepted by the Princes is the most important basis of Paramountcy, and since Paramountcy resting upon this basis is a source of a separate part of the Prerogative, no alteration in this usage or in the Prerogative resulting from it can be effected without the consent of the Princes."

As an eminent jurist he is no doubt aware of the curious proposition he is thus advancing against the legal supremacy of the Parliament of Great Britain.⁴

¹ The Residency bazaars of Indore and Hyderabad have been retroceded to the States on 14th May 1933.

² Piggott—*Ex-territoriality*, pp. 18-21.

³ *Law Quarterly*, 1930, p. 429.

⁴ 'Supremacy' is preferable to 'Sovereignty' which is as-

From Sir W. Lee Warner down to the Indian States' Committee, Paramountcy has been advisedly left undefined. But the bogey of "a separate part of the prerogative of the Crown resting upon treaties, engagements, *Sanads*, usages, and sufferance" and a curious "usage which gives *suzerainty* to a Paramount Power over States possessed of some of the powers which make up sovereignty" are raised for the purpose of linking them *irrevocably* to the "Crown acting through agents responsible to the Parliament of Great Britain."

This novel theory is based "on legal and technical grounds as well as on grounds of policy." So far as the legal basis is concerned, three arguments have been advanced by the eminent Indian jurist, Sir P. S. Sivaswamy Iyer, in support of the correct historical position that "the Crown acted, not in a personal capacity or in the capacity of sovereign of England, but in the capacity of Ruler of British India, in its relations with Indian States."¹

Again, Prof. Holdsworth's ingenious reply to Sir P. S. Sivaswamy Iyer is couched in the statement that "a change in the form of the Government of British India which gave to British India full responsible Government in effect brings into existence a new and autonomous State." To call India with Dominion Status a "*new state*" is surprising. Prof. Holdsworth is perhaps driven to this length for the purpose of evolving the argument from Prof. Hall

sociated with politico-theological dogmas. Vide Dr. Jennings. *The Law of the Constitution*, p. 129.

¹ Sir P. S. S. Iyer "*Indian Constitutional Problems*", pp. 210-213.

that "a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered."¹ Are the British Dominions to be construed as *new* States after the Statute of Westminster? There is in spite of the Statute, a singular unanimity among British constitutional writers that "there is no deviation from the unity in the fact that the Crown appears in various aspects and that in these aspects there may be collisions of interests and of rights" (Prof. A. B. Keith). Since the passing of the two recent Acts (*The Status of Union Act*, 1934, and the *Royal Executive Functions and Seals Act*, 1934) in South Africa, it would appear that "all the prerogatives of the Crown in relation to South Africa are capable of being distinguished and separated from those in relation either to the United Kingdom or to the rest of the Empire or to other self-governing Dominions."² In fact the Seventh Contract to be entered into for India by the Crown has been anticipated by Mr. Noel Baker. The correct way to interpret it is to regard the Crown (according to Mr. Fitzgerald) "as the same king acting in a several capacity."

Besides these arguments, two observations have to be made. There can be no limitation upon the doctrine of legal supremacy of Parliament in Great Britain. Secondly, there is not in constitutional law a single prerogative of the Crown which the Parliament cannot touch by enacting a statute for its abridgment,

¹ Hall *International Law*, VI Ed., pp. 342-343.

² Evatt, *The King and His Dominion Governors*, p. 313.

curtailment or other mode of regulation. It has also been held that when the operation of a statute overlaps the exercise of a prerogative, the prerogative is superseded to the extent of the overlapping.¹ It has further been established that prerogative affecting the Dominions may be swept away by their Parliaments.²

The arguments based on 'grounds of policy' may work so much against the inevitable development of India into a Dominion as understood under the Statute of Westminster, that it deserves to be knocked on the head. It looks intriguing that Prof. Holdsworth, while disagreeing with the argument of the counsel for the Princes based upon their "treaty-sovereign rights" is building up a laboured argument on "usage" which on his own showing has to rest foisted upon a strained basis of "implied consent" (?). The talented counsel for the Princes strenuously argued that "mere usage cannot vary the treaties of agreements." Prof. Holdsworth has forged a golden chain linking the Princes for ever with "the Crown, acting through agents responsible to Parliament" basing one of his main arguments of the special character of usage as a source of paramountcy.

In further complication, Sir W. Holdsworth argues that "Paramountcy is only a part of the prerogative." The next step in his argument is that the "prerogative

¹ *Attorney-General vs. De Keyser's Royal Hotel Ltd.*, 1920 A. C. 508.

² In 1933 the Parliaments of the Irish Free State and Canada abolished respectively all rights of appeal from the Supreme Court of the Irish Free State and all appeals from Canada in criminal cases. Vide also 1935 A. C. 484 and 1935 A. C. 500.

is not the source of paramountcy." He then develops his thesis that "the growth of Paramountcy has added a new and a distinct prerogative to the Crown."

This hydra-headed creature, which is ever growing and whose ambit refuses definition, has at once to face juristic modifications:—

(a) Certain of the rights possessed by the Paramount Power, e.g., the right to confer honours and decorations and to decide questions of precedence, have to owe their origin 'to certain of the powers possessed by the King in virtue of his prerogative.'

(b) The King by virtue of his prerogative also possesses large powers of 'control over such matters as foreign affairs, national defence, justice or trade.'¹ It can be maintained that directly or indirectly all powers of the Paramount Power, including those of deposing a Ruler for gross misrule, are *derivable* from the Crown's prerogative powers as described by an illustrious jurist like Blackstone.

N. D. Varadachariar has ably argued from English Constitutional practice and the fact of change of agency from the East India Company to the Crown *without consulting* the Rulers in 1858 (*vide* § 67, Government of India Act, 1858) that there is not much substance in the plea of the princes that their rights and obligations arising from the Treaties, engagements and Sanads cannot be assigned by the Crown to any other party except with their consent.

The Chamber of Princes in their historic session on March 11, 1940 reiterated its view thus:—"This

¹ Vide Blackstone, *Commentaries*, I, 252-278.

Chamber further records its view that any Constitutional scheme which may involve the transference of the relationship of the States with the Crown to any other authority without their free and voluntary agreement, or which may permit of alterations affecting the rights and interests of the States without their consent cannot be acceptable to them." Sir C. P. Ramaswamy Iyer, the able Dewan of Travancore and a brilliant lawyer, has been assiduously developing this position thus:—"Many of these treaties are on a contractual basis although they are founded also on the theory of allegiance to the British Crown coupled with rights and obligations arising out of Treaty and usage. It cannot be asserted that if the Crown parts with power today, the Princes also have to do so. Nor can there be an automatic transfer of allegiance or obligations or rights to some other political entity, excepting on the basis of fresh understandings and new treaties. On the other hand, if the Crown withdraws from India, the Indian States presumably will resume the position they occupied in India before the treaties were entered into." ¹ Sir Ramaswamy Iyer is fully conversant with the development of British Constitutional law and its trends particularly since 1931. The true position appears to be that since as a matter of law the Crown can only act on advice it is of no concern to strangers who have nothing to do with the course of development of British Constitutional law as to which advice it acts under at a given time. Is it seriously contended that the Rulers will have to be consulted on this course of development

¹ Press statement, dated Feb. 7, 1940.

of British Constitutional Law ?

On the other hand, extreme unbalanced views to pension off the Princely order and hold them as anachronisms have been expressed in quarters wherefrom inspiration is derived for the greatest political organization in India. The history of Indian States prior to British dominance, and a careful reading of Treaties, Engagements, and *Sanads* reinforce that internal sovereignty was and continues in the States. It is highly desirable that the inevitable and promised evolution of India into a Dominion should proceed in this *realistic setting* of the status of Indian States. Mere legalistic argument on treaties will only lead to dexterous cobwebs: Under the trammels of the old treaties, many important constitutional steps have been taken up in Mysore, Travancore and Cochin after successfully persuading the Paramount Power. The shackles of treaties of eighteenth and nineteenth centuries—these treaties have in vital parts run into desuetude thanks to the farseeing statesmanship of the Rulers and their advisers in Mysore, Travancore and Cochin—have not as a *matter of fact* interfered with the day-to-day administration of these States. As regards the interpretation of these treaties, engagements, and *Sanads*, excepting with regard to specific rights or prerogatives which have been specially granted to individual princes, these treaties which have been entered into at a time when the political status of both the British Government and the Princes was far different from what it is at present, have to be interpreted according to the political relationship that exists at present in practice.

Viewed thus, *a federation is inevitable for a solution*

of the Indian Political Problem. Strong corroboration is got for this view from a dynamic approach as well. The modern sovereign States when they are petty have been found unable to resist the aggressions of unscrupulous neighbours. The big fish have a tendency to eat away the neighbouring small fish. A veritable hindi repetition of the मात्स्यन्याय indeed! Wise thinkers have been planning for a federation of like-minded nations with the Federal part vested with control of foreign affairs, defence, and financial powers necessary for the foregoing purposes. In *such a setting there is no place for 601 petty principalities.* These persist to this day owing to the might of the Paramount Power. In *their own interests* amalgamation, regrouping, and coalescing in a *federation* are necessary. The process has to be done legally through the appointment of a Royal Commission vested with authority by the Crown after this fateful maelstrom in Europe. To progressive minds with profound faith in constitutional evolution, these developments appear inevitable. Neither a forlorn reactionary stand on "moth-eaten" treaties, nor the blind fury of scrapping away 'mutual rights and obligations' can bring about a peaceful and permanent solution. The States *voluntarily moving* with the times as e.g., Mysore, Baroda, Kashmir and Cochin, will be assisting in the birth of a *renascent federal India*, while the Paramount Power should *actively foster* the array and development of centripetal

¹ Cf. Kautilya, *Arthasastra*, I, 13. Manu VII, 20. Ramayana *Ayodhya Kanda*, LXVII, 31. Mahabharata *Santi parva*, LXVII 16-17: LXVIII, 11-12. Kamandaka II, 40.

forces. Indian States and British India "should enter into friendly contacts and discussion,"¹ instead of indulging in a long range bombardment with mutual recrimination.

The Scheme of the Government of India Act 1935 (its alteration after the war is inevitable and implicit in the Viceregal Declaration of August 8th, 1940) *vis a vis* the resumption of powers by the Crown and their redistribution falls here to be examined. Under § 2 of the Act

1. "All rights, authority and jurisdiction heretofore belonging to His Majesty the King Emperor of India, which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him or in relation to any other territories in India are exercisable by His Majesty except so far as may be otherwise provided by or under this Act or as may be otherwise directed by His Majesty; provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India if not exercised by His Majesty, be exercised only by or by persons acting under the authority of His Majesty's Representative for the exercise of those functions of the Crown.

2. "The said rights, authority, and jurisdiction shall include any rights, authority, or jurisdiction heretofore exercisable in or in relation to any territories in India by the Secretary of State in Council, the Go-

¹The author is indebted to *Sir C. P. Ramaswamy Iyer* for valuable suggestions.

vernor-General, the Governor-General-in-Council, any Governor or any Local Government whether by delegation from His Majesty or otherwise."

It will certainly give satisfaction to the Indian States' Committee that the phrase "*or otherwise*" will include rights acquired through 'usage, sufferance, or political practice.' It may thus be argued in a sense that the discussion whether the relations of States were with the Government of India or the Crown *simpliciter* has been ended.

In fact in a speech delivered to the Hyderabad Legislative Council on 5th February, 1940, Sir Abkar Hydari, the doughty champion of Hyderabad's interests, has once again formally restressed that "the States' relations are with the Crown in the United Kingdom." He has clutched upon "the high office of Crown Representative" as being symbolic of it (*Vide* § 3 Govt. of India Act, 1935). He has also laid down the *ipse dixit* that "any Constitution for India, if it involves, even in part the transference of those relations to any other authority must necessarily require the assent of His Exalted Highness in so far as Hyderabad is concerned." He has further followed it up by emphatically asserting that this view "applies no less to Defence than to other matters where powers have been handed over by the State to the Crown." Thus, if a "radical change..... with regard to defence takes place, it cannot be considered as being applicable to the State without the States' consent."

Prof. A. B. Keith, a high constitutional authority, has met this view of Sir Akbar Hydari through a remarkable letter published in the leading daily, 'The

Hindu', of Madras.¹ Prof. Keith adverts to the historical letter of Lord Reading to the Nizam dated 27th March, 1926 which stressed the hard fact of the "Sovereignty of the British Crown in India." Prof. Keith has further laid down the emphatic answer that "the Sovereignty of the British Crown means the Sovereignty of the Crown in Parliament and that Sovereignty neither Hyderabad nor any other State has any legal or moral right to question."

Even after the resumption and redistribution of all powers by the Crown, from Dominion practice as well as from the Royal and Parliamentary Titles Act of 1927 (which continues the term 'Emperor of India'), the Crown has to be taken *vis-a-vis* his functions in this context as Emperor of India. Having succeeded to the East India Company, the Crown as Sovereign of British India is the legal entity which functions as Paramount Power. "Free and equal partnership in the British Commonwealth" which has been reiterated in authoritative quarters as the definite goal of India, will create not a new state but only an autonomous state. The Parliament of Great Britain is legally supreme, and a Statute of Parliament can always cede the exercise of its Paramountcy to the Ministry responsible to an autonomous Indian Federal Legislature. Legal cobwebs apart, the Indian States owe their subordinate co-operation not to the Crown in his personal or individual aspect, but to "*His Majesty the Emperor of India*," in his *political aspect*.

¹ Dated 20th February 1940.

CHAPTER VI

CANONS OF INTERPRETATION OF TREATIES

Disputes arising from legal or quasi-legal relationship have constituted one of the causes of wars. This class of disputes between nations can be brought under:—

- (a) Interpretation of Treaties.
- (b) Contractual rights and duties.
- (c) Definitions of boundaries and
- (d) Delicts.

Differences arising out of interpretation of treaties have supplied a fruitful source of wars. Of the twelve cases that were decided by arbitration between 1900 and 1913 two related to the Interpretation of Treaties. Disputes as to the interpretation of a treaty are declared under Art. XIII of the League Covenant as “generally suitable for submission to arbitration or judicial settlement.” The jurisdiction of the Permanent Court of International Justice is now being increasingly regarded as compulsory in the classes of legal disputes concerning the interpretation of a treaty under Art 36 of the Hague Statute.

Though there are no technical rules in international law for the interpretation of treaties, its objective should be “to give effect to the intention of the

parties as fully and fairly as possible." (Brierly). Nor should lawyers trained in the methods of interpretation by an English municipal court forget that

English draftsmanship tends to be more detailed than Continental and it receives and perhaps demands a more literal interpretation.

As Professor Hall put it

there is no place for the refinements of the courts in the rough jurisprudence of nations. (Hall VII, Edition S. III Note).

There is an inclination to treat a treaty as a contract in municipal law. This conception is "wholly misleading." Let us, on the contrary, deal with it as a

treaty, the parties to which are great States operating under popular restraints and psychological stimuli which do not control individual action. (*The Canadian Bar Review*, April 1934, p. 196).

Grotius and the later authorities seem to have applied rules of Roman law regarding interpretation of treaties. So long as these rules did not contravene canons of common sense they were well and good. The following important rules laid down by *Grotius* deserve special mention.

1. "The proper rule of interpretation is to gather the intention of the parties pledged from the most probable signs." (Page 137, *Grotius' De Jure Belli Ac Pacis*, Volume II, Edited by Campbell).
2. "Words are not to be strictly taken in the grammatical sense, but in their common accepta-

tion." To like effect is the observation of Judge Blackstone; "words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar as their general and popular use." (Introduction to Commentaries, Ch. II, pages 59).

3. "In terms of art, recourse must be had to those who are most experienced in that art."

4. "If the sole and effectual reason, by which the promise was influenced, should have ceased, the obligation also would be void, the sole ground on which it rested, being no longer in existence." (p. 173).

As Oppenheim puts it, the interpretation of treaties is a matter of consent between the contracting parties. The important point is to get at the real intention of parties and that enquiry is not to be shackled by any rule of interpretation which may exist in a particular national jurisprudence. (*Westlake*) (I, p. 293). In all recent treaties, there is a "*Compromis clause*," which provides that in case the parties do not agree on questions of interpretation, these questions shall be settled by arbitration. This new agreement to clear up the disputed points in the way that seems most convenient at the time need not always be the way pointed out by strict rules of interpretation.

As a matter of normal practice, an interpretation by an international tribunal only binds the parties who have referred their dispute to the tribunal but Art. 62 of the Hague Statute enables an

interested third State to intervene in the pro-

ceedings and Art. 63 enjoins the Registrar of the Permanent Court in the case of the construction of a convention to notify all the parties to the convention, and a State which exercises its right to intervene in the proceedings is equally bound by the judgment. Since it is the intention of the parties which is the thing to be got at, the principles of construction must be only means to that end.

The traditional canons of interpretation of treaties deserve re-examination. Vattel published his canons in 1758 and "*Pothier on Obligations*" appeared in 1761. Pothier lays down twelve rules of construction very similar to those of Vattel. Both had quarried out of the Roman Digest.

Vattel's rules have been elaborated by Phillimore and they have crept into the text-books of International Law, Of the twelve rules of Pothier Dr. C. Fourman (*Grotius Society Transactions*, Vol. XX, 1934, p. 129 follg.) notes that ten were incorporated *verbatim* in the Napoleonic Code, whence they have been received in the Italian Code.

1. It is not permissible to interpret what has no need of interpretation.¹
2. If he who could and should have explained himself clearly and fully has not done it, so much the worse for him, he cannot afterwards be ad-

¹ Many references are found in judgments and opinions that there is a prime need to give effect to the plain terms of a treaty. Dr. McNair calls this rightly as a presumption and not an absolute rule of interpretation: "*Law of Treaties*" McNair, p. 176.

mitted to prove restrictions which he has not expressed.

3. Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind.

4. Whenever a person could and should have expressed his intention, what he did express in sufficiently clear terms is assumed against him as his real intention.

5. The interpretation of every contract and of every treaty should, therefore, be conducted according to fixed rules, adapted to determining the meaning of the contract as it was naturally understood by the parties when drawn up and accepted.

After laying down the general rules "founded upon reason and authorized by the natural law" he considers the desirability of rules "to obtain a just and fair interpretation." A fundamental difference between English and Continental Courts lies in the use of preparatory documents for the purpose of interpreting a treaty, (*Travaux Préparatoires*).¹

An English Court does not in general regard itself as being at liberty to examine the negotiations preceding the formation of a written contract or the proceedings in Parliament during the passage of a Bill for the purpose of ascertaining the meaning of the contract or the Statute and the practice is apparently the same when the court

¹ Compare with श्रुति, क्तिङ्ग, वाक्य, and प्रकरण rules of Mimamsa interpretation.

is invited to construe a treaty, (*Porter v. Freuden-
burg*, 1915 1 K. B. 876). In *R. V. Bishop of Oxford*,
1879, 4 Q. B. D. 525.

When the case came before the court of Appeal, the learned Judges referred to the speech of Lord Chancellor Cairns in the House of Lords regarding the policy and meaning of Public Worship Regulation Act of 1874. Lord Selborne rebuked this practice in *S. E. Ry. Coy. Commissions* (1881 50 L. J. Q. B. 201, 203). To like effect is the observation of Lord Halsbury in *Hilder v. Dexter*, 1902 A. C. 474. As Lord Chief Justice Cockburn put it, in *R. V. Hertford College*, 3 Q. B. D. 1878, 693, 707.

"We are not however concerned with what Parliament intended but only with what it has said in the Statute. The Statute is clear and the parliamentary history of the Statute is wisely inadmissible to explain it, if it is not."

The reason for this exclusion of *travaux préparatoires*, is that they were

considered dangerous for a Jury who not being expert in such matters, might attach to them too great a weight (*American Journal of International Law*, Vol. III, p. 50).

Another reason for this English practice lies in the fact that reference to the proceedings of one estate alone as indicative of the intentions of the three estates is not fair or proper. (Dr. H. Lauterpacht). This objection, it is submitted, is not applicable to the interpretation of agreements between States. A Commission under Art. V of the Jay Treaty of November 19,

1794 between U. S. A. and Great Britain was established to decide what river was the river St. Croix intended by the treaty of 1782-83 forming a part of the boundary between U. S. A. and New Brunswick. There was at that time no river known as St. Croix. The depositions of John Adams and John Jay, surviving negotiators of the treaty of 1782-83 as well as a letter of Benjamin Franklin

also a negotiator of the Treaty, were received in evidence as declarations concerning the original negotiations and the agreement itself. (*American Journal of International Law*, III, p. 54).

The method of interpretation consists in finding out the "connection made by the parties to an agreement between the terms of their contract and the objects to which it is to be applied."

This involves the ascertainment of the standard of interpretation and learning what are the sources of interpretation. The arbitration of British claims against Venezuela before the Mixed Commission of 1903 is a good illustration of a decision where all the sources of interpretation were gone into by the Umpire, Mr. Plumley. Art. III of the Instrument which ran as follows came up for interpretation:—

The Venezuelan government admit their liability in cases where the claim is for inquiry to or wrongful seizure of property and consequently to questions which the mixed commissions will have to decide in such cases will only be

(a) Whether the injury took place and whether

the seizure was wrongful

- (b) and if so what amount of compensation is due.

After searching for sources of interpretation and examining the diplomatic correspondence between the two governments, the Umpire held that while the British Government thought the terms of agreement broad enough to include British claims to "indemnity for losses suffered through acts of insurgents," it could not invoke a construction which Venezuela neither knew of nor had reason to know of, and to which it therefore had never assented.

In the "*Lotus Case*" (Judgment No. 9) P. C. I. J. Series A. P. 16) while the French Government deduced that the prosecution of Lt. Demons (Captain of *S. S. Lotus*) was contrary to the intention which guided the preparation of the Convention of Lausanne, the Permanent Court held that

"it must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work (*travaux préparatoires*) if the text of a Convention is sufficiently clear in itself."

The Permanent Court has also laid down that the minutes of the preparatory work of a treaty cannot be used to determine its meaning and are not admissible in evidence against a party to that treaty which did not take part in the preparatory work and the fact that they have been published does not render them admissible. (*The Law Quar-*

terly, September 1933).

In the case of the *Oder Commission* (Judgment No. 16, P. C. I. J. Series A, page 20) while Poland contended that the Barcelona Convention could not bind her as it has not been ratified by her, the Permanent Court held that

an ordinary rule of international law is that Conventions, save in certain exceptional cases are binding only by virtue of their ratification. The court concludes (at page 21) that even having regard to Art. 338 of the Treaty of Versailles, it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification.

Commenting on these rules laid down in the case of the International Commission of the Oder, Sir John Fischer Williams points out:—

The case of the Oder may serve to reassure the timidity of some English lawyers. While in a case where the text itself is not clear, help may be sought from preliminary interchanges of views between the parties, the court will not travel wider and look at documents to which the parties themselves are strangers. And where the text is clear, you cannot refer to preliminary correspondence to throw doubt upon the meaning of the written word.

The rule adopted by the Permanent Court is sum-

med up by a writer in the *American Journal of International Law*, (1929, page 752) thus:—

provided a meaning can be attributed to the text of a treaty having regard of course, to the context of the provision under discussion and to the historical facts leading up to the agreement, extraneous evidence be it verbal or written, discussions, and negotiations including conditions and interpretations cannot be used for the purpose of arriving at the true construction of the Instrument.¹

Rebus Sic Stantibus

As Prof. Brierly puts it, "it may be that if International Law insists too rigidly" upon the binding force of treaties, it will merely defeat its purpose by encouraging their violation. The neutralization of the Black Sea (of 1856), the Austrian annexation of Bosnia and Herzegovina and the declaration of Bulgarian independence of 1908 are instances of the inadvisability of making rigid treaties which contain in themselves elements of their own violation.

The problem of the attitude of International Law to oppressive or obsolete treaty obligation remains and an attempt has been made "by many writers to solve it by the doctrine of the *Clausula rebus sic stantibus*." This is a doctrine of text writers, though it has been used in argument to justify the repudiation of treaty

¹ Unlike the normal practice of exclusion of *Travaux Préparatoires* followed by English Courts, in the interpretation of Treaties these sources of interpretation may be had in certain circumstances. (Vide McNair, *Law of Treaties*, 262-270.)

obligations.

Regarding this *Clausula rebus sic Stantibus* Prof. Bryce asks:—

Can anything be done to determine when circumstances have so far changed that a treaty can no longer be fairly deemed to be operative; and when such a change has come how to settle whether it is the duty of the high contracting parties to denounce or to propose to amend the treaty (Bryce, *International Relations*, page 168)? Three instances are also cited by Prof. Bryce.

In the Treaty of Paris (1856) Russia had promised to maintain no navy in the Black Sea. In 1871, she announced that she would no longer respect this provision at the time of war between France and Germany.

Further a clause in the Treaty of Berlin (1878) bound Russia not to fortify the harbour of Batum on the Black Sea. But in 1886, Russia declared that she would disregard this provision.

Prof. Bryce pointedly comments on this that both these treaty obligations had been imposed upon Russia at a time when the forces arrayed against her were too strong to be resisted. She accepted them willingly under a sort of duress.

Again the foreign minister, Count von Aurenthal of Austria Hungary declared his intention to annex Bosnia.

which had been assigned to Austria under the Treaty of Berlin to be occupied by her without prejudice to the sovereignty of Turkey.

Prof. Brierly pointedly observes that there seems to be no recorded case in which the application of the *clausula* has been admitted by both parties to a controversy or in which it has received judicial recognition from an international tribunal.

The doctrine itself takes different forms in different writers. In municipal law, it is called the principle of frustration. Lord Sumner held in 1919 A. C. 435 distinguishing it from 1916 2 A. C. 397, (*F. A. Tamplin Steamship Company, Ltd., v. Anglo-Mexican Petroleum Products Company, Ltd.*) that the principle of the frustration of the adventure applies to a time charter. Mr. Justice Russell describes the doctrine in *re Badische Company Bayer Co. etc.*, (1921, 2 Ch. 331 at 379) thus :—

The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract.

Lord Sumner has well stated that the

legal effect of frustration does not depend on their

intention or their opinions, or even knowledge as to the event which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. (1926 A. C. 497 at 509).

Hirji Mulgi and others v. Cheong Yue, Steamship Company, Ltd. 1926 A. C. 497, is one of the leading cases illustrating the application of the doctrine of frustration.

By a Charter party made in November 1916, the respondents agreed to place their steamship at the disposal of the appellants at Singapore on March 1, 1917, and the appellants agreed to employ her on specified terms for ten months from the date when she was delivered to them. The Charter party contained a clause by which all disputes arising out of the contract were submitted to arbitration in Hong-Kong. The ship was requisitioned by the government before March 1, 1917 and was not released till February 1919. The appellants then refused to take delivery of her. An arbitrator awarded the respondent damages for breach of contract and they brought an action upon the award. Held that there had been in 1917 a frustration of the Charter party which forthwith brought an end to the whole contract.

Publicists agree to the doctrine with great reluctance only (e.g., Grotius and Vattel) and Bynkershoek disagrees with it altogether. Lammasch maintains that the *clausula* is not a recognized customary rule of International Law but attempts to establish that treaties

of alliance and guarantee are concluded according to the principle *rebus sic stantibus*.

Dr. Lauterpacht whose contributions to post-War (1914-18) development of International Law are of great value also holds

that the Permanent Court will be competent to deal with the purely legal aspect of the *clausula* viz., with those cases in which a State will claim the right to be relieved from an obligation on account of supervening impossibility of performance or of frustration of the object of the treaty as a result of the fulfilment of an express or implied condition.

The Court will be in a position to entertain requests of this kind notwithstanding the fact that the *clausula* even in its purely legal aspect, is neither a customary nor a conventional rule of International Law. For, International Law applicable by the court does not consist solely and exclusively of rules expressly recognized by States; also, the

general principles of law recognized by civilized nations are according to Art. 38 (3) of the Hague Statute, applicable as binding rules of international law when there are no conventional or customary rules at hand.

With due respect to Dr. Lauterpacht this argument though clever is far-fetched. This doctrine being differently interpreted, it is necessary to reiterate that the doctrine is essentially unjuridical; as Brierly tersely puts it, even if political motives sometimes lead to a

treaty being treated as a "Scrap of paper, international lawyers need not invent a pseudo-legal principle to justify such acts." An *empowering* to bring the case for the violence of a treaty before the Permanent Court of Justice, it is submitted, will be necessary to get the court seized of suitable cases.

This doctrine has been considered by a German court in *The Free Hanseatic City of Bremen v. Prussia*, (June 26, 1925). The Court is reported to have held in the case that

International Law recognises to a large extent the possibility of the termination of treaties in accordance with the principle—*Rebus sic Stantibus*, but it negated the applicability of the principle in the particular case (Edited by Sir John F. Williams in his "*Chapters on Current International Law and League of Nations*" at page 111).

The French Chamber of Deputies in December 1932 invoked the principle *rebus sic stantibus* as "recognised in public international law, treaties and conventions" in connection with the question of inter-allied debts.

Continental jurists are found to distinguish between a grammatical and logical interpretation. Under the former, words are given a rigid and absolute meaning divorced from their context. Logical interpretation lies in the study of the statute in the whole of its historical and juridical context.

A study of Westlake, Hall, Oppenheim, and the judgments and advisory opinions of the Permanent Court enables one to formulate the following rules of

interpretation.

There is a preliminary and fundamental rule that it "is not allowable to interpret what has no need of interpretation." *Vattel* 11, section 263.

1. Treaties should be interpreted according to their reasonable as opposed to their literal sense. The Treaty of Utrecht (1713) stipulated in Art. IX that the port and fortifications of Dunkirk should be destroyed and never be rebuilt. France complied with this stipulation but at the same time began building an even larger port at Mardyck, a league off Dunkirk. Great Britain protested on the ground that France, in so acting was violating the reasonable although not the literal sense of the Peace of Utrecht. France in the end recognized the force of this contention and discontinued the building of the new port.

2. The terms used in a treaty must be interpreted according to their usual meaning in the language of every day life provided that they are not expressly used in a certain technical meaning.

3. If the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable.

4. The whole of the treaty must be taken into consideration if the meaning of any one of its stipulations is doubtful.

5. In its advisory opinion No. 12 P. C. I. J. Series B, (page 25) on the question of the frontier between France and Irak, the Permanent Court has admitted the soundness of the principle that if

the wording of a treaty provision is not clear,

in choosing between several admissible interpretations the one which involves the minimum of obligations for the parties should be adopted.

6. Previous treaties between the same parties and treaties between one of the parties and third parties may be referred to, for the purpose of clearing up the meaning of a stipulation.

7. If there is a discrepancy between

the clear meaning of a stipulation and the intention of one of the parties as declared during the negotiations which preceded the signing of a treaty, the decision must depend upon the merits of the special case.

8. In case of a discrepancy between the clear meaning of a stipulation and the intention of all the parties as unanimously declared during the negotiations which preceded the signing of the treaty, the meaning which corresponds to the real intentions of the parties must prevail over the meaning of the text. Reference is often made to the Report of the Drafting Committee on the unratified Declaration of London.

9. If

two meanings of a stipulation are admissible according to the text of a treaty, such meaning is to prevail as the party proposing the stipulation knew at the time to be the meaning preferred by the party accepting it.

10. Prof. Hall postulates another proposition that when terms used in a treaty had a different legal sense between the two contracting states, they are to be under-

stood in the sense which is proper to them within the State to which the provision containing them applies; if the provision applies to both states, the terms of double meaning are to be understood in the sense proper within them respectively (*Hall*, VIII Edition, Section III, page 392).

11. By the Treaty of 1886, it was stipulated between Austria and Italy that inhabitants of the provinces ceded by Austria should enjoy the right of withdrawing with their property into Austrian territory during a year from the date of the exchange of ratifications. In Austria the word "inhabitant" signifies such persons only as are domiciled according to Austrian law; in Italy, it is applied to every one living in a commune and registered as resident. The language of the treaty therefore had not an identical meaning in the two countries. As the provisions referred to territory which was Austrian at the moment of the signature of the treaty "the term inhabitant was construed in conformity with Austrian Law."

11. (a) In the *Mavrommatis Concessions* (P. C. Series A, No. 2, page 19) the English text "public control" with regard to the powers attributed to the Palestine Administration had a more restricted meaning than the French text. The court also held that it was of opinion

that where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which

so far as it goes, is doubtless in accordance with the common intention of the parties.

12. In the case of *Serbian Loans* (P. C. I. J. Series A, No 20, page 30), the rule *generalia specialibus non derogant* was recognized. As it was observed in the case

the special words according to elementary principles of interpretation, control the general expression.

Further, they continue :—

the bond must be taken as a whole, and it cannot be so taken if the stipulation as to gold francs is disregarded.

13. In the case of *Brazilian Loans* (Series A, No. 21, page 114), the P. C. I. J. held

the familiar rule for the construction of instruments that where they are found to be ambiguous, they should be taken *contra proferentem*. If two meanings of a stipulation are admissible that which is least to the advantage of the party for whose benefit the stipulation was inserted in the treaty should be preferred.

An interpretation is not admissible

which would make a stipulation meaningless or ineffective.

When a strict or liberal construction of treaty stipulations is to be made will, according to the Permanent Court, arise only, where ordinary methods of interpretation have failed. As the court has put it :

it is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd (P. C. I. J. B. Series No 11, page 39) *Polish Postal Service in Danzig*.

Vide also Kawaski Kisen Kabushiki of Kobe v. Bantham S. S. Coy. 55, Times Law Reporter, p. 503.

The application of any number of general principles must depend as Wheaton reminds us on "the nature and terms of the particular guarantee" or provision in the Treaty in question. (Wheaton, IV Ed., p. 393).

Case-Law

Of the cases on interpretation of treaties *Tucker v. Alexandroff*, U. S. Supreme Court, 183 U. S. R. 424 (1902) is instructive for its plea of "fair and liberal interpretation" of treaties.

A writ of *habeas corpus* issued upon the petition of Alexandroff to inquire into the case of his detention by keeper of Philadelphia county prison and master of the Russian Cruiser. The rights of the parties fell to be determined by the treaty for the arrest and delivery over of deserting seamen—to wit the ninth article of the treaty with France dated November 14, 1788 authorizing the arrest and surrender of deserters from the ships of war and merchant vessels of their country. Chancellor Kent, (*Commentaries*) (Volume 1, page 174) is quoted with approval for the proposition that treaties of every kind are to receive "a fair and liberal interpretation according to the intention of the contracting par-

ties and are to be kept with the most scrupulous good faith."

In, "*The Amiable Isabella Munds Claimant*" (U. S. Supreme Court 1821, 6, Wheaton's Reports I) Spanish ship and cargo captured by the privateer Roger were condemned as valid prize of war and the sentence was affirmed by the circuit court. An appeal being allowed to the Supreme Court, the case was argued and reargued. Justice Story delivering the leading judgment held that the fourth and last point contended by the counsel for the captors was

that the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article so far as it purports to give any effect to the passports is inoperative and imperfect and the imperfection cannot be supplied by any judicial tribunal.

While on this, point, the Supreme Court laid down that

in the first place, the court does not possess any treaty-making power. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind.

The Court held affirming the judgment of the circuit court with costs, that the form of the passport

not having been annexed to the 17th Article of the Treaty, the immunity whatever it was, never took effect.

In *Whitney v. Robertson*, (1887, 124 U. S. 190, Scott, page 458).

Action was brought by the plaintiff to recover a sum of 21,936 dollars paid by him under protest to the defendant, the collector of customs as duty on a large quantity of sugar which had been imported by the plaintiff from San Domingo and which the plaintiff claimed as exempt from duty by virtue of the provisions of a treaty existing between U. S. A. and the dominican Republic.

The defendant demurred to the complaint, and the demurrer having been upheld, judgment was given for the defendant. On appeal to the Supreme Court, the judgment of the court below was affirmed.

Justice Field held that since the act of Congress authorizing these duties was passed after the treaty with the Dominican Republic had been concluded,

if there was any conflict between the stipulations of the Treaty and the requirements of law, the latter must prevail.

Conflicts between International Law and Treaties arise and the principles applicable in such cases of reconciliation have a fundamental basic connection with interpretation of treaties.

The dispute between England and U. S. A. regarding the settlement of the north-west boundary between U. S. A. and Canada, turned on the interpretation to be put on existing treaties.

England submitted to the German Emperor, the

Arbitrator, the following rules of interpretation:—

- (1) The words of a treaty are to be taken to be used in the sense in which they were commonly used at the time when the treaty was entered into.
- (2) In interpreting any expression in a treaty regard must be had to the context and spirit of the whole treaty.
- (3) The interpretation should be drawn from the connection and relation of the different parts.
- (4) The interpretation should be suitable to the reason of the treaty.
- (5) Treaties are to be interpreted in a favourable rather than an odious sense.
- (6) Whatever interpretation tends to change the existing state of things at the time the treaty was made is to be ranked in the class of odious things.

The North Atlantic Coast Fisheries Arbitration of 1910 before the Hague Court turned on the meaning of the renunciation clause in the Treaty of 1818 by which the inhabitants of U. S. A. gave up any former right enjoyed or claimed by taking, drying or curing fish,

in or within three marine miles of any of the coast bays, creeks, or harbours of Her Britannic Majesty's Dominions in N. America.

Great Britain contended that the bays which were referred to in the treaty without qualification were geographical bays and that it was immaterial whether

apart from the treaty, they were territorial or not, though she maintained that they were in fact territorial.

The U. S. A. contended that the bays referred to were those under the sovereignty of Great Britain by which was meant those that were six miles or less, *inter fauces terrae* because the three-mile rule as shown by the treaty was a principle of International Law applicable to coasts and should be strictly and systematically applied to bays.

The majority of the arbitrators favoured Great Britain's general contentions.

Whatever be the interpretation to change the existing state of things at the time the treaty was made it is to be ranked in the class of odious things (*vide* Parliamentary Papers, North America, 1873 (No. 3, pp. 6-9).

Where a Colonial ordinance passed to give effect to the Treaty between Great Britain and China, authorised extradition to the Chinese Government of any of its subjects charged with having committed "any crime or offence against the laws of China," the Privy Council construed these words as limited to those crimes and offences which are punishable by the laws of all civilized nations, and as not including acts which though against the laws of China, would be innocent in Europe.

Mr. Quincy Wright has arrived at three principles after a learned research into this branch of conflicts of interpretation:—

(*American Journal of International Law*, XI, pp.

578 to 579).

1. Treaties are of legal validity only as between signatories and are superseded by customary international law in determining the rights of non-signatory states when no statutory rule exists.

Though obvious, it is essential to stress,

(a) that as between *signatories only* treaties are legally binding.

(b) Secondly, in the absence of statutory rules, treaties are superseded by customary international law when the rights of non-signatory States fall to be decided.

Thus England was under no legal obligation to observe the Armed Neutrality of 1780 and 1800; nor was the U. S. A. legally bound to observe the Declarations of Paris (1856) during her Civil War.

2. Treaties ordinarily take precedence of customary International Law in determining the rights of signatories but when derogating from the rights of non-signatories under customary International Law or from rights of signatories recognized by that law since the conclusion of the Treaty, they will generally be interpreted in harmony with it.

The Alaska Boundary Arbitration of 1903 was an instance of the interpretation of a treaty in harmony with international law, especially with the principle of prescription.

3. When two treaties are in conflict, courts will generally give precedence to the earlier if the sig-

natories are different, to the later if they are the same.

Thus the Hay-Pauncefote Treaty concluded by U. S. A. with Great Britain in 1901 supersedes the Clayton-Bulwar Treaty of 1850 with reference to the Panama Canal.

A conflict also arose between Art. 17 of the Treaty of U. S. A. with France of 1778 and Art. 24 of the treaty with England of 1794. The former Article required the U. S. A. to admit French privateers and their prizes to American ports for purposes of repair and supplies whereas the latter required her to forbid all belligerent privateers these privileges. In the case of *The Amity* (Federated cases, p. 741, 1796) a British vessel taken prize by the French and sold in U. S. A., the U. S. A. court admitted the validity of the earlier French treaty and refused jurisdiction; but it later became evident that these privileges were incompatible with the obligations of neutrality imposed by customary international law and the French treaty was abrogated by Legislative Act on July 7, 1798.

With regard to the language of treaties, till the middle of the XVIII Century, treaties were ordinarily in Latin; but subsequently French took its place. Since 1921, French and English texts are authoritative. "The Permanent Court is busy," writes Professor Pitt-Cobbett (Vol. I. p, 346)

and has been busy since its inception, in hammering out rules for the interpretation of treaties which will have the effect of eventually rendering this happy hunting ground of the more speculative sort of text-book writer more or less uninhabitable.

CHAPTER VII

INTERPRETATION OF TREATIES, ENGAGEMENTS AND SANADS

SOME DISPUTES EXAMINED

Before facing the vital question of interpretation of these treaties, engagements and sanads, examination of a few disputes that have arisen is instructive.

The East India Company's governments had to define their attitude to treaties "some of whose obligations could not be observed." Warren Hastings, the first Governor-General had to argue in 1775 against the inviolability of sacred rights acquired under treaties under every circumstance in the case of the annual tribute of 26 lakhs of rupees to Shah Alum. Warren Hastings said that such a view of inviolability regardless of good policy or necessity would have bound the Company to guarantee to Shah Alum Corah and Allahabad, even if "the King threw himself under the protection of the Mahrattas." Likewise, to defend the territories of Shujah-ud-Dowla "without any stipulated compensation and to pay the Nawab of Bengal an annual stipend of 32 lakhs even if the Mahrattas became powerful would subject the exposed territories of Shuja Dowlah to frequent invasions."¹

¹ G. W. Forrest, *Selection of State Papers in Foreign Department* (1772-1785), Vol. II. Minute of Warren Hastings entered in

Lord Cornwallis would observe the Treaty of Peace with Tippu Sultan although the Company was equally bound to go to the help of the Poona administration when Tippu Sultan took hostile action against it.¹ He would get out of these engagements only after communication with the Mahrattas.

The imperious Marquess of Wellesley in a letter to Colonel Palmer, Resident at Poonah, (8th July 1798) stated it to be a fundamental maxim of the law of nations, "that treaties of a defensive nature (unless limited in express terms) *are not merely personal contracts* with the reigning prince, but permanent obligations binding the faith of the State, into whatever hands the supreme power may devolve"² (Italics author's).

That one treaty made with a chief could be superseded by another made with his successor was evident from the order issued by Dundas in the Case of the Nawab of the Carnatic in 1788.³

Bundi Treaty of 1818

The articles of the Treaty with Bundi (1818) dealing with Keshoripatam afford an instance of provisions of a Treaty found subsequently to be *ultra vires*. The British Government with the object of rewarding Umaid Singh of Bundi for his valuable assis-

consultation of 13th September 1775.

¹ Ross: *Cornwallis Correspondence*, Vol. I, Ch. VIII. Letter of Cornwallis to C. W. Mallot, February 27, 1789.

² Martin: *Despatches, Minutes and Correspondence*, Vol. I, p. 114 of the *Marquess of Wellesley*.

³ Ross: *Cornwallis Correspondence*, Vol. II. Henry Dundas to Cornwallis, August 1, 1788.

tance to Monson's army in its retreat before Holkar in 1804, spontaneously remitted "to the Rajah and his descendants the tribute which the Raja used to pay to Maharajah Holkar and which has been ceded by the Maharaja Holkar to the British Government." (Art. IV). Under Art V of the same Treaty, the Raja agreed to pay "to the British Government the tribute and revenue theretofore paid by him to Scindia" and this was specified in the second schedule to the Treaty as Rs. 40,000 tribute in respect of two-thirds of the Pargana of Keshoripetam and Rs. 40,000 revenue in respect of "chauth of Bundi and other places."

It had been the intention of Government to restore to Bundi the territories usurped by Scindia as well as Holkar; and under the belief that the whole of Keshoripetam had been so usurped, it was entered in the schedules of the Treaty. After the conclusion of the Treaty it was discovered that the Pargana of Keshoripetam had been *previously ceded by Bundi* to the Peishwa who during the ministry of Nana Furnavis had conferred two-thirds of it on Scindia and one-third on Holkar, that Bundi paid no tribute in respect of it either to Scindia or Holkar; that Holkar's share had not been ceded by the Treaty of Mandasor because the "Pargana" was not "within the north of the Bundi Hills" and that the Treaty of 1817 with Scindia did not cover Scindia's share of Keshoripetam, since it only referred to territory in Bundi in respect of which tribute was paid or payable to Scindia. The Bundi Treaty was therefore *ultra vires* when it purported to transfer to Bundi Holkar's one-third share of Keshoripetam and also when it required Bundi to

pay to the British Government Rs. 40,000 on account of tribute due to Scindia from the remaining two-thirds of it. Scindia had in 1806 farmed his share of the *pargana* for a short time to Bundi but had afterwards resumed it, and it seems that the British Government believed, that at the time of the conclusion of the Treaty with Bundi, Scindia's possession of his two-thirds share of Keshoripetam was in lieu of tribute due to him by Bundi. "As this proved not to be the case, the tribute of Rs. 40,000/- on account of Scindia's two-thirds of the *pargana* was not exacted from Bundi, but the cession to Bundi of Holkar's one-third share was allowed to stand, and the British Government agreed to pay Holkar Rs. 30,000 annually as compensation for the territory of which he had been erroneously deprived."¹

Treaty with Dholpur (1805)

A treaty of amity and alliance was concluded on 29th January, 1804 between the East India Company and Rana Kerrut Singh providing for mutual advantage to be derived by the contracting parties.

The Maharaja Rana was unable to settle the country of Gohud and others and to fulfil the engagements therein entered into with the East India Company for the payment of the subsidiary force of the Company's troops; thus the advantages proposed for both the contracting parties had entirely failed. The Company and the Rana agreed in 1806 that the treaty of 1804 should be considered as *null and void* (Art. I

¹ Aitchison, V Edition, Vol. III, pp. 217-218.

of the Treaty with Dholpur 19th December 1805).

The following instances of *cancellation* of treaties by subsequent ones may here be noted:—A prior treaty of January 26, 1780 was cancelled by the Treaty of Salbai (1782). A treaty was concluded with Jodhpur in 1803; but Man Singh of Jodhpur proposed another instead of ratifying it and the treaty was formally cancelled in May 1804. A Treaty with Jaipur was concluded in 1803. This alliance was dissolved through Cornwallis' policy of abandoning the Subsidiary System. This could not be justified on higher grounds of preserving solemn Covenants. Political expediency of such a type was rightly condemned by Lord Lake on grounds of "general policy and good faith." Likewise the Treaty with Partabgarh (1804) was dissolved, and a later Treaty was concluded in 1818.

Obsolescence of Treaties

In September 1818 a treaty was concluded with Banswara. The Maharawal of Banswara refused to consider himself bound by the Treaty which had been negotiated with his accredited agent. Meantime, the Dhar State had ceded to the British Government its claims of tribute on Dungarpore and Banswara. Hence a new treaty was concluded on 25th December 1818.

In 1824, Maharawal Juswant Singh entered into an engagement to pay Rs. 8,400 p.a. to the Company's Government for "the pay of the horse and foot stationed with him"; but this engagement was never enforced and was subsequently declared to be obsolete.

An identical engagement was made with Banswara in 1824 which also became obsolete.

In re. the *right of the Gwalior Durbar to tax the civilian population of Cantonments*, the Durbar put the issue thus on November 2, 1907:—"The Durbar think that looking to the history, nature and scope of these military stations, the Government of India will agree with them in the view that these Cantonments were never intended to be converted into and used as commercial marts to the prejudice of the interests both of the Durbar and their other subjects outside the Cantonments." Though the Government of India recognized this right in 1911, the Resident at Gwalior gave expression in one of his letters to the Durbar to this view. It is considered not open to the Durbar to put forward new claims based on a literal interpretation of treaties, many of the provisions of which are obsolete or have to be continued with reference to conditions which have subsequently arisen." The Gwalior Durbar sent a memorable reply to this *ipse dixit*:—"The Treaties are the palladium of the rights and privileges of the Durbar and the scrupulous regard with which the British Government have always maintained intact both the letter and the spirit of the Treaty provisions constitutes the strongest bulwark of the integrity, safety, and permanence of whatever of territory and rights was left to the State on the conclusion of the Treaties. They cannot therefore.....be regarded as liable to be considered obsolete or to be construed with reference to the exigencies of changed times, except where *an inexorable and all-compel-*

ling necessity demands it.....”¹

The force of treaties has been determined by circumstances.

An echo of the doctrine of *Rebus Sic Stantibus* is heard in the letter of the Governor-General to the Secretary of State for India dated 30th May 1868 when the applicability of Article V of the Subsidiary Treaty with Mysore (1799) to the circumstances of 1868 was in issue. This article appeared to be inapplicable inasmuch as since the death of the Maharajah the British Government administered the “country as the paramount power during a minority and not in consequence of the default of the native administration which could bring into force the fifth article of the Treaty.”²

The Bhopal Case (1863)

In 1863, the Ruler of Bhopal protested against the exercise of Jurisdiction by the Political Agent over British subjects, Indian or European, resident in the principality of Bhopal and relied very properly on Art IX of the Bhopal Treaty of 1818 whereby “the jurisdiction of the British Government shall not in any manner be introduced into the principality.” The Begum claimed the right under certain arrangements³ made with the Political Agent in 1847 to try in her own courts British subjects guilty of offences within her territories and the surrender of British Subjects guilty of

¹ Quoted in Nicholson’s “*Scraps of Paper*”, 145--146.

² Correspondence relating to the establishment of a Native Government in Mysore. Parliamentary Papers 1878. House of Commons, 385-388.

³ Printed in footnote to p. 288. Aitchison, IV Ed., Vol. IV.

such offences when apprehended in British territories.

The official point of view was based on three considerations:—

- (a) the intention of the Treaty,
- (b) the proper construction of the Treaty,
- (c) the effect of Parliamentary Legislation.¹

The principle underlying the treaty of 1818 was, it was argued by the Government of India, "contained in Art. III which declares that the Bhopal Durbar will act in Subordinate Co-operation with the British Government and acknowledge its Supremacy; that Article IX referred to the authority of the Nawab over his own subjects within his own territory and not to British subjects;" (this interpretation of Art IX will do violence to all canons of interpretation of the article) that "this was apparent *first* from the correspondence which took place when the treaty was concluded, and which showed that the object of the clause was to guarantee to the Nawab that the British Courts of Justice would not be introduced into his territories;" (reference to correspondence culminating in a treaty termed *travaux préparatoires* has been uniformly prohibited under British municipal and international Judicial practice) and *secondly* by the omission of all reference to European offenders, who had a right to be tried in a certain form and under certain conditions which the East India Company had no authority to compromise or surrender; that the arrangement of 1847 was never sanctioned by the Government of India

¹ Lee Warner, *The Native States of India*, p. 345.

and contained a stipulation which was entirely inadmissible viz., that British subjects charged with offences in Bhopal, if arrested in British territory should be handed over to the Bhopal authorities for trial and punishment.

Under Statute 24 and 25 Vic. (Cap. LXVII) (The Indian Councils Act 1861), Parliament gave the legislative council authority to make laws for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty. The effect of this parliamentary legislation was also raised by the Government of India.

The claim of the Begum of Bhopal was not admitted by the Government of India.

Travancore Jurisdictional Issue (1871)

The unsuccessful attempt to take away from the Travancore State in 1871 the jurisdiction of the territorial Sovereign over European British Subjects is highly instructive. The Travancore Durbar claimed such jurisdiction both as an inherent right of sovereignty and also as having been admitted by the British Government in 1837 when Europeans living in Travancore and not being Servants of the British Government were declared to be subject to the laws of the State. The Government of India based their claims on paramountcy and on the legislative changes (1861) made since by a statute of the Imperial Parliament. On behalf of Travancore, this was repudiated by their Counsel J. D. Mayne, an eminent authority thus:—The jurisdiction “cannot of course go beyond

the powers given by the statute; (24 and 25 Vict. Cap. LXVII) and the statute though binding on all British subjects has no force against the sovereign of Travancore or his servants, who are not subject to the authority of the British Parliament. Even if the Statute purported in express terms to take away the jurisdiction previously exercised by the Courts of Travancore, it would be simply inoperative against them. Parliament is as incapable of taking away the powers of a Court in Travancore as it is of dealing with the Courts of France. But I agree that neither the Statute nor the proclamation contemplated any interference of that sort." When faced with this opinion, "the Government of India changed their views and the State of Travancore was allowed to retain its jurisdiction subject to certain specified terms and conditions."¹

Hyderabad Treaty of 1802

Art I and III of the Hyderabad Treaty, 1802 run as follows:—

"As the testimony of the firm friendship, union and attachment subsisting between the Honourable Company and H. H. The Nawab Asaph Jah, the Honourable Company hereby agree to grant to His Highness the free use of the seaport of Masulipatam, at which port His Highness shall be at liberty to establish a commercial factory and agents, under such regulations as the nature of the Company's Government shall require and as shall be adjusted between the Governor-

¹ D. K. Sen, *Indian States*, p. 102.

General in Council and His Said Highness.

There shall be free transit between the territories of the contracting parties of all articles being the growth, produce or manufacture of each respectively, and also of all articles being the growth, produce or manufacture of any part of His Brittanic Majesty's Dominions".

The claims which the Nizam's Government bases on these articles are as follows:—

(1) The right to a free corridor to the Sea at Masulipatam and a permit to develop a port so as to enable Hyderabad to make effective use of it "under the conditions that would obtain in the India of the future." The Nizam's Government urges that "this consideration renders it very (necessary that Hyderabad should own and control a railway of its own from its border to Masulipatam.)

(2) A right to import free of British Indian Customs through any port or overland from beyond British India, all articles which are the growth, produce or manufacture of any part of His Majesty's Dominions, together with a corresponding right to export free of duty all articles of Hyderabad origin.

The decision on these claims really rests on the interpretation of the words "*free use* of Masulipatam" in the Treaty. Whether a full and an extended meaning in a modern setting should be given to it is the question. *Prima facie*, the words lend themselves to that meaning. The Davidson Committee were cautious in expressing "no opinion as to the meaning of the words."¹

¹ *Report of Davidson Committee*, p. 135.

In regard to the second claim of Hyderabad it has to be stated that in 1873 in answer to a claim advanced by certain merchants, the Government gave an interpretation adverse to this claim. The question since not then in issue between the Government of India and Hyderabad, has not the effect of a decision much less of *Res Judicata*.

The question has been referred to the Government of India for ascertaining the respective rights of the contracting parties.

Gwalior Treaty of 1803

In the history of the transactions between the East India Company and Scindhia, how Art. IX of the Treaty of Surjee-Anjengaum (1803) was construed to include surrender of Gohad and Gwalior to British Government is painfully surprising. The question is even now a perplexing academic controversy.

On the disruption of the Moghul Empire, Gwalior had fallen into the hands of the Rana of Gohad. From him it was wrested by the Mahrattas but when Major Popham took the place by assault in 1780, he gave it back to the Rana of Gohad. General Wellesley referred to this in his letter to Malcolm in January 1804, where *inter alia* he had stated "If Gwalior had belonged to Scindhia, it must be given up; and I acknowledge that whether it did or not, I should be inclined to give it to him. I declare that when I view the treaty of peace (Surjee-Anjengaum) and the consequences, I am afraid it will be imagined that the moderation of the British Government in India has a strong resemblance

to the ambition of other Governments.”

The conduct of the Rana of Gohud did not justify the protection afforded to him. He was unfaithful to the Government to which he owed everything. Mah-dojee Scindia laid siege to the place and marched into it in 1784. From that time Gwalior “had been held by the family of Scindia who had some time before the war with the English appointed Ambaji Inglia, Governor of the place. This man, a double-dyed traitor, undertook in 1803, to surrender the fortress to the enemies of his master, but secretly instigated his Commandant not to deliver it up at the appointed time. It was therefore invested by the British troops and on the 5th February, 1804 it fell into English hands.”¹ The treaty of peace of *Surjee-Anjengaum* had been concluded on 30th December, 1803 (ratified by the Governor-General in Council 13th February, 1804) between General Wellesley and Wattel Punt. Art. II *inter alia* of the treaty stated that “such countries formerly in the possession of the Maharajah (Scindia) situated between Jey-pore and Jodhpore, and to the southward of the former are to belong to the Maharajah.” Art. IX set forth that “certain territories have been made by the British Government with Rajahs and others heretofore feudatories of the Maharaja.....These treaties are to be confirmed, and the Maharaja hereby renounces all claim upon the persons with whom such treaties have been made and declares them to be independent of his government and authority, provided that none of the territories belonging to the Maharaja, situated to the southward

¹ Kaye, *Life and Correspondence of Sir J. Malcolm*, Vol. I, p. 265.

of those of the Rajahs of Jeypore and Jodhpore and the Rana of Gohud, of which the revenues have been collected by him or his Amildars or have been applicable, as *Surinjamee*, to the payment of his troops are granted away by such treaties."

The question turned upon the construction of these two articles. As the impartial biographer of illustrious Malcolm put it, "the treaty with Scindhia had been negotiated in ignorance of the engagements which had been entered into by General Lake with the feudatory chiefs. And there was now some difficulty to reconcile with each other (the Company's) different obligations to the several parties with whom (the Company) had contracted alliances at the end of the war." Scindia's title to Gwalior might have been explained away by a technical narrow interpretation of the letter of the treaty. Malcolm in a letter to his old friend, Mr. Graeme Mercer (dated March 30, 1804) wrote *inter alia*. "These people do not understand the laws of nations.....They will never be reconciled to the idea that a treaty should be negotiated upon one principle and fulfilled upon another. The plain fact is this. General Wellesley was wholly ignorant about Gohud and Gwalior; he thought that Rana's was a State to be maintained instead of being one that it was meant to restore,—hence all these mistakes....." General Wellesley frankly acknowledged that when he negotiated the peace he knew nothing about the Rana of Gohud and the position he held before the war. As Kaye puts it, "the fact is that there was no such principality in existence. It had been extinguished by Scindhia and was now to

be re-established.”¹ Thus while Malcolm was strong in his conviction that *justice* and *policy* alike demanded that Gwalior should be given up to Scindhia, the masterful Governor-General declared that justice did not require the Government to surrender the place, whilst sound policy imperatively called upon the Government to keep it out of Scindhia’s hands. Lord Wellesley underscored the words “promotion of the public interests” in a letter written by Malcolm to Edmonstone (Public Secretary of Lord Wellesley) and appended to them this note in the margin.—“Mr. Malcolm’s duty is to obey my orders and to enforce my instructions. I will look after the *public* interests.” Arthur Wellesley though he vacillated between these two opinions, rejected all thoughts of present expediency and placed the question on a statesmanlike broad basis thus:—“I would sacrifice Gwalior,” he wrote to Malcolm, “or every frontier of India ten times over in order to preserve our credit for scrupulous good faith, and the advantages and honour we gained by the late war and the peace; and we must not fritter them away in arguments drawn from overstrained principles of the laws of nations which are not understood in this country.”

Scindhia felt deeply mortified at his deprivation of Gohad and Gwalior and committed hostile acts by detaining the Resident a prisoner. After Lord Cornwallis’ arrival, policy was changed, and Cornwallis renewed negotiations on the basis of restoring these territories to Scindhia. The Treaty of 1805, was intended to do away “with doubts and misunderstandings which

¹ Kaye, *Malcolm*, Vol I, p. 269.

had arisen respecting the clear meaning and interpretation of parts of the 'Treaty of Anjungaum.'

Bhavnagar Agreements of 1860 and 1866

Special Treaty rights of Bhavnagar regarding her principal port have been noticed. After the first establishment of the Viramgam line in 1904, controversy rose up regarding the claims of Bhavnagar for preferential treatment. The Government of India adverted to the clause "full benefits of a British Port" in the two agreements of 1860 and 1866 opined that this "assurance had reference solely to the trade of Bhavnagar by sea" and 'as a matter of legal construction' did not preclude the Government of India from taxing at its land frontier, goods imported *via* Bhavnagar port. The Secretary of State for India of the period (Lord Morley) over-ruled this *ipse dixit* of the Government of India and laid down that "so long as His Highness fulfils his part of the Agreement, it is not open to Government to hinder or tax the land trade of Bhavnagar by the establishment of a customs line." But in regard to the minor ports in the State, Lord Morley held that the Government of India was not committed to a formal agreement in consideration of value received, as in the case of Bhavnagar port itself.¹

The Government of India made a reference to the Secretary of State for India in 1927 before reimposing the Viramgam line. The Secretary of State concurred with the view that the arrangements made in 1865 re-

¹ Davidson Committee Report, p. 118.

garding the minor ports "do not in the changed circumstances prevent (the British Government) from re-considering the position in regard to these ports and in the last resort imposing a customs barrier against goods imported through them."

The Two Bikaner Rebellions of 1830 and 1883

In 1830 preparations were made by the Resident at Delhi to send a force to Bikaner to assist the Ruler in reducing some rebellious nobles. The Resident's action was based upon a misconstruction of Art. VI and VII of the Treaty with Bikaner (1818). These articles gave the Ruler of Bikaner "no right to call on the British Government for military aid against his disaffected subjects at any future period. The Government of India were of opinion that the case was not one in which they were called on to interfere and reminded the Resident that military aid should never be given to Indian States for the suppression of internal disturbances except under the specific authority of Government."¹

While the case of 1830 is of some value, the incident at Bikaner of 1883 appears to be purely a question of policy. An attempt which was made to raise the "*rekh*" or money payment taken from the Thakurs in commutation for service brought matters to a crisis. The nobles rose in rebellion and refused to come to any amicable settlement. A small British army marched into the country when the Thakurs quiet-

¹ Aitchison, V. Ed., Vol. III, p. 278.

ly submitted.

In the vast variety of Indian States, it is manifestly out of the question to apply purely legal canons to interpret the treaties, engagements, and *sanads*. The protagonists of the Indian States had themselves to admit that "there is in the case of every State a separate history, a separate set of rights, a separate set of obligations and a separate economic position."¹ In the background of each treaty, its clauses stand revealing the main purpose.

To treat these treaties of an earlier time as "scraps of paper" or "rotten parchments" or "moth-eaten" is out of the question. The historian as well as the student of constitutional law is bound to attach value to statutory ratifications and solemn declarations of 1858, 1903, 1911, 1919, and 1921. Neither principles of international justice nor British political practice will support dallying with solemn covenants.

It is a well-recognized rule that purely defensive alliances excluding out of deference to Grotius wars manifestly unjust—ensure permanently as agreements of good faith "which must ultimately decide upon all contracts between Sovereign States." The *Principal intention of the alliance* should never be frustrated. The treaties were defensive alliances, to start with, the Company offering to protect the Ruler, and the State reciprocating and later (since the Marquess of Hastings) acting "in Subordinate Co-operation" with the British Government. The Treaties are not personal contracts but partake of the nature of covenants running with

¹ *The British Crown and the Indian States*, Preface.

the land, whereunder the benefit or burden of the treaties passes to the "successors in title" who are the Rulers recognized as such by the Paramount Power. In interpreting any defensive alliance, application of general principles must "depend on the nature and terms of the particular guarantees contained in the treaty in question." (Wheaton).

It is the opinion of Dr. A. D. McNair that when one turns to the "contractual kind of treaties, those which embody bargains between the parties regulating their future conduct or confer mutual rights of trading or fishing for their respective subjects, ex-territoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature, one is in the realm of different ideas from true law-making treaties. It is in the sphere of this kind of treaty that the "*rebus sic stantibus*" doctrine will find its development on the legal side.

Among the distinguished writers, Professor Hall observed that "the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved or even when the interests of the subjects of the native princes are gravely affected." Sir W. Lee Warner developed the theme of applicability of the doctrine of *rebus sic stantibus* thus:—

"Treaties and engagements of the Indian States cannot be fully understood either without reference to the relations of the parties at the time of their conclusion or without reference to the relations since established between them. As

Wheaton observes, 'the moment those relations cease to exist, by means of a change in the social organization of one of the contracting parties of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen the change, the treaty ceases to be obligatory upon him.' The resignation by the Peshwa of Sovereignty in 1818, the trial of the Emperor of Delhi, the transfer of the Company's rule to the Crown, and the deposition of the Gaekwar of Baroda are the historical events which affect Indian States and modify phrases of equality and reciprocity."

For the applicability of this doctrine there are two limitations. The changes in the circumstances must be vital and the State trying to release itself must give "reasonably sufficient" notice. The political changes between 1818 and 1858 were real and vital. The case for the applicability of the *Clausula* would be complete were it not for the statutory ratification of the treaties and the wide proclamation respecting their "dignities, rights and privileges" in 1858, 1903, 1911, 1919 and 1921. Later ratification really cuts across the application of this pseudo-legal principle of text-writers.

Sir William Lee Warner, one of the most authorized expounders of the Indian State-System, has laid down a rule of guidance for interpreting these treaties, engagements and *sanads*. "For the interpretation of any one of the collection, a study of the whole body of them as well as the facts of history which surround

them is essential.”¹ Lord Hardinge who guaranteed on 16th March, 1846 the independent possession of Kashmir to the Maharaja Gulab Singh, found himself under the necessity of stating to the Maharaja on 7th January, 1848 that “the British Government are bound by no obligation to force the people to submit to a ruler who has deprived himself of their allegiance by his misconduct.” And he supported that statement by saying, “Your Highness is aware of the principle by which the British Government is guided in its treaties with Eastern princes.” As Professor Westlake comments upon this, he “construed a treaty not by its bare words but as necessarily reserving the right of the Paramount Power to follow its known principles of action.”² The doctrine has been well put as follows:—“There is a Paramount Power in the British Crown, of which the extent is wisely left undefined. There is a subordination in the Indian States which is understood but not explained. The Paramount Power intervenes only on grounds of general policy, where the interests of the Indian people or the safety of the British power are at stake. Irrespective of those features of Sovereign right which Indian States have for the most part ceded or circumscribed by treaty, there are certainly some of which they have been silently but effectually deprived.”

According to Sir W. Lee Warner, treaties and grants held by the protected princes and the precedents of British Government’s dealings with them and with

¹ Lee Warner, “*The Native States of India*,” p. 246.

² Westlake, *Collected Papers*, p. 211.

the protected princes who hold no treaties or grants must be read as a whole, like the decisions of English Courts of Justice, so that the principles most recently laid down are to be applied to all, and those relating to any department of Conduct, as military affairs or the duties of humanity, are to be ascertained for all from the document in which that department is most fully worked out for any one. This is really a doctrine which evidently presupposes the enjoyment of a very thorough superiority by the power to the unilateral acts of which such an effect is ascribed.¹

Thus, these treaties, engagements and *Sanads*, though they resemble ordinary legal contracts, liable to modification, alteration or abrogation, differ from these contracts "enforceable at law in that there is no tribunal except that of resort to military strength or of appeal to the sense of justice of *the stronger of the two parties* which could secure the observance of these political agreements."² (*Italics author's*).

The vital question that has to be faced is this:—Is the letter of the treaties to be stuck to in spite of the changes of the status of the States from an international to an imperial plane?

Among recent writers, Dr. Mehta states very properly that "as regards treaties, it will be conceded that they alone can neither obstruct development nor prevent a change in the relative position of the contracting parties. The actual relations therefore have to be estimated in the light of the conditions prevailing

¹ *Collected Papers*, Westlake, p. 212.

² A. B. Lathe *Problems of Indian States*., p. 36.

at the time of the interpretation of the treaties and not at the time when they were made.”¹ This is the proper view for the practical statesmen and the subjects of Indian States are concerned only “with the rules and usages by which the relations of the British Government and the States are and have been governed.” (Per Sir P. S. Sivaswamy Iyer).²

Thanks to the farseeing statesmanship of the Rulers and their advisers at Baroda, Mysore, Travancore and Cochin, the shackles of treaties of the eighteenth and nineteenth centuries have in some parts run into desuetude. Since 1927, the practice of the British Government being consulted in all appointments in Travancore carrying a salary of Rs. 500 p.m., has been “given up on its own volition” by the Paramount Power. Many important constitutional steps taken by Mysore, Baroda, Travancore and Cochin under the trammels of the old treaties indicate to the discerning observer the parts that are running into disuse.

As regards thus the interpretation of these treaties, engagements and *Sanads*, excepting with regard to specific rights or prerogatives which have been specially granted to individual Rulers, these treaties which have been entered into at a time when the political status of both the British Government and the Rulers

¹ Dr. Mehta, *Lord Hastings and the Indian States*, p. 246.

² It may here be noted that under British practice though changes of political power and influence would not entitle one party to “terminate or modify a treaty without the consent of the other” successive British Government have been ready to regard a change in political conditions as a ground for a re-examination of a Treaty by all parties. (Mcnaur, *Law of Treaties*, p. 376.)

was far different from what it is at present, *have to be interpreted according to the political relationship that exists at present in practice.*

Interpretation of Instruments of Accession

§ 6, Government of India Act, 1935, provides a method whereby the States may accede to the Federation and deals with the legal consequences which flow from the accession. The Government of India Bill used the following words:—

“His Majesty has signified the acceptance of a declaration made by the Ruler thereof.” The amendment in the Act into an “Instrument of Accession” was introduced to “make it clear that the Instrument of Accession is the operative document.”

It is to be noted that the term “Instrument” used in the Act clearly differentiates it from the term “treaty” The rules of interpretation that will be applicable to these Instruments of Accession will be those which govern statutes. No extrinsic evidence “of the intention of the parties to the instrument, whether at the time of executing the instrument or before or after that time is admissible.”¹ Even if these instruments were deemed to be akin to treaties—they certainly are not treaties which can be registered at Geneva or interpreted at the Hague—an English Court does not in general regard itself as “being at liberty to examine the negotiations

¹ *Shore vs. Wilson*, 1842, 4 St. Tr. N. S. App. 1370.

preceding the formation of a written contract or the proceedings in Parliament during the passage of a Bill for the purpose of ascertaining the meaning of the contract or the Statute and the practice is apparently the same when the court is invited to construe a treaty."¹

It is a well-established doctrine of the constitutional law of the British Empire as evident from the catena of decisions starting with *Queen v. Burah*² that the grant by Parliament of Legislative powers to Colonial and Indian legislatures implies "plenary powers." In this setting, the interpretation of the Instrument of Accession far from being narrow, is bound to be affected by the doctrine of "implied powers" in determining the extent and validity of federal legislation on federal subjects as "accepted" by the States.

¹ *Porter vs. Freudenburg*, 1915, I. K. B. 876.

² 1878 (3) A. C. 889.

Vide also the observations of Sir B. Peacock in *Hodge vs. The Queen* 9 A. C. 117 at 132, as also of Lord Macmillan in *Croft v. Dunphy*, 1933 A. C. 156.

CHAPTER VIII

CONCLUSIONS

At every point of study of these treaties, engagements and *Sanads*, one finds purely legal ideas or jural concepts made inapplicable owing to the inroads made by the tentacles of paramountcy or by more subtle applications of the doctrine of Act of State "defying jural analysis."

The relationship that has been established between the British Government and the Indian States has passed through the stages of ring-fence, subordinate isolation, imperial union, and cordial co-operation. The East India Company made treaties with each State separately and although several treaties of a period contain some very similar provisions, each treaty stands by itself. No definite principles or policies ever uniformly characterized the Company. Each occasion was dealt with according to its necessities.¹

There have been as many classifications of these States, Jagirs and Estates, as there have been thinking minds. Though the States governed by Treaties constitute among the most important, *Sanads* by way of treaties have been issued to States enjoying a high degree of internal autonomy also.

Marks of a commercial origin have been left behind

¹ A. B. Latthe, *The Problems of Indian States*, p. 29.

indelibly by the East India Company in all branches of the British Administrative System in India, and not the least important as a singular administrative functionary is the Political Agent, an unique diplomatic official who was at once more and less than an Ambassador. The epoch-making Resolution of the Government of India in 1891 after the Manipur disturbances was only erroneous to this extent that it was worded too wide to exclude application of principles of international justice to Indian States.

Instead of lowering down standards of weights and measures, it can only be maintained that Indian States in different degrees and varieties of internal sovereignty—have long ago lost their recognition as persons of international law. With shreds of Sovereignty intact, with Rulers who have some rights of foreign sovereigns while travelling abroad, with subjects who like their cousins across the all-too-thin frontier are British Protected Subjects while travelling outside their States, the status of Indian States that emerges from this legal analysis is *quasi-international*.

Waking up from their wonted slumber, the Rulers of Indian States brushed up their eyes and opened their dusty archives to the scrutiny of eminent counsel. Legal theories evolved by such illustrious counsel look potent and sufficiently wind-and-weather proof in their exposition; but they "cannot stand the test of experience and cannot be justified by the hard logic of facts".

The central problem of this picturesque branch of Indian Jurisprudence dating from 1766 to 1940 yet remains to be faced *by the Rulers as a class*. Deprived

of the weapons of external aggrandizement, the Indian States have suffered from internal stagnation and decrepitude. *Paramountcy in the absence of a Cordial Federation between British India and Indian States* is bound to be an *unending tutelage* to the States.

The only constitutional way to escape the tightening effects of a perpetual tutelage—and Paramountcy means nothing else for the States—is “for the States to pursue a path of constitutional reform wherein a power will be brought into existence within the Indian State itself to check the natural faults of autocracy.” This *internal power* of self-improvement has none of the “evil tendencies of external force trying to check the excessive growth of the evils of autocracy.” On the contrary, as the veteran administrator A. B. Latthe puts it, “it has the capacity to stimulate the wholesome activities of the State in its corporate life and if intervention is a palliative in acute stages of illness, an internal constitutional reform would mean the growth and stimulation of vital forces within the body which would destroy the foreign bacilli in the veins and promote natural health and vigour.”¹

The States *voluntarily* moving with the times as Aundh, Baroda, Mysore, and Cochin will alone be assisting in the birth of a *renascent federal India*. Neither a forlorn legalistic stand on time-worn treaties, nor the crouching support of an external agency, can help Indian States to preserve their *integrity* in the future.

The Indian States which under illustrious Rulers as the late Sir Sayaji Rao Gaekwar and Sri Krishna

¹ A. B. Latthe, *Problems of Indian States*, pp. 133-134.

Raja Wodayar of model Mysore were eagerly looked for as the laboratory for progressive experiments should make the choice between "the path which leads to internal stagnation and decrepitude and the path which will lie through a partnership with the rest of India." They might choose to live under the withering "shadows of Paramountcy and confine themselves to the narrow grounds of isolated but indolently pleasant existence or they might join with one another and with the rest of their country, in a common life of growing nationalism." Sir Mirza Ismail, a trained Indian Dewan has indicated the path to be pursued by the reactionary Rulers:—"The more constitutionally governed a State is, the less justification or likelihood there is or will be, for any intervention on the part of the Paramount Power in its domestic concerns."

In such a setting, an analytical study of the treaties, engagements and Sanads—including typical agreements for extradition, Railways, opium, salt, postal conventions, agreements for Indian State Forces, and other miscellaneous arrangements—reinforces the lesson that in an alliance between two States one of which grew much more powerful than the other as to become Paramount, the intrusions of the predominant power *have to be accepted*. Salt agreements, opium conventions, jurisdiction in and extension of Cantonments and residency bazars, closing of mints and coinage, extension of postal system, abolition of transit duties, curtailment of the enfeebled state-forces, the Railway agreements, favourable terms in forest leases, interportal conventions and the Berar Agreements—these have illustrated the

price of protection by the Paramount Power.

Amidst such an all-devouring growth of paramountcy the striking service done by political officers¹ as Malcolm, Metcalfe, Low and Elphinstone in maintaining the British "*reputation for good faith*"² stands out in striking relief. When the British Government brought the Indian States under its protection, it must be admitted that the British weakened the efficacy of checks on the abuse of autocracy. Political propaganda has produced such unbalanced literature regarding the condition of State-subjects on either side that it is hardly realized that conditions in Indian States might have been infinitely worse if the Paramount Power had not interfered on behalf of State-subjects.³

The implications of paramountcy could not be thus brought under any legal formulae. The Princes who were still pressing for a definition of Paramountcy were authoritatively answered thus by the Secretary of State for India in the House of Commons:—"In ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in his dealings with the States. No successful attempt could be made to define exactly the right of the Crown's Representative to intervene."⁴

¹ In particular the zealous efforts made by Charles Metcalfe to reveal the gross frauds" of Palmer and Co. in Hyderabad deserve mention (Vide C. H. Philips, *The East India Company* (1784-1834), 1940, pp. 225-228).

² Malcolm's *Letter to Mercer* dated March 30, 1804.

³ Vide the Gaekwar Golden Jubilee Memorial Lectures of 1940-41 on "*Paramountcy and State-subjects*" by the present author.

⁴ House of Commons Debates, 20th March, 1935, p. 1236.

The Rulers of Indian States are bound to be shaken further out of their wonted lethargy by the present European War fought mainly for the preservation of freedom and democracy. These Rulers cannot offer their services in such a fateful maelstrom while they continue to be despots at home.

More than six hundred Protected States, Jagirs and Estates persist in India owing to the *might of the Paramount Power*. Territorial redistribution of these petty states, which cannot maintain a policeman and a school-master is overdue. A study of the several *sanads* and engagements draws in the lesson that when the number is reduced to 200 neither treaty nor any other solemn engagement would be violated. What must be the exact number retained is a matter for consideration by a *Royal Commission which should be appointed immediately after the war without any further delay*.

The problem of India's *Defence* by Federal India unless tackled from a distinctly national point of approach will always leave the Indian States dependent on an external agency. "Equal partnership in the Commonwealth" which is explicit in the authoritative declaration of 8th August, 1940 will be a far-off dream unless India is allowed to defend her land, shores, and superincumbent air-space. From the point of view of *fundamental change* of circumstances, all the provisions in treaties which appear in the form "of obligations.....of supporting in certain eventualities, the Rulers of Indian States" would have to run into desuetude when Federal India will take charge of external affairs and internal defence.

Paramountcy would *disappear* with the Federation.

It would be an untenable view in law to hold that the obligations of the Crown imply that the States should never be enabled to rely on their own united strength and the strength of British India put together for the defence of their mother-land, India. Unless the burden of self-defence is borne by *Federal India*, India could never in law become an equal partner of the Commonwealth.

A significant lesson of the study of solemn time-worn Treaties leads to the paradox that *real strength of Federal India will grow pari passu with the shackles of these treaties running into desuetude*.¹

The happiest day of the Crown will be when it will be only *advised by the Federal Ministry of India*—constituted of the two Indias of today—such a logical consummation of the destiny of Britain's great adventure in India is possible only when the many shackles of these treaties and *sanads* sometimes thrust on petty States, *are allowed to wither away*.² British constitutional history and the evolution of Dominions point only towards such a destination.

¹ Sir K. N. Haksaris is of opinion that "it would still be necessary specifically to incorporate the obligation of subsisting Treaties in the revised Indian constitution." (The XXth Century, January 1941, p. 271).

² Though normally the result of the entry of a State into a Federal Union is complete extinction of the Treaties of the new member (per the Report of 16th January 1857 quoted with regard to a Treaty between Great Britain and the Republic of Texas) this reasoning, it is submitted, will not apply in the "Case of a British Colony entering a larger British unit of a federal character." (Vide McNair, *Law of Treaties*, p. 435). Since His Britannic Majesty was the original contracting party, His Majesty will continue to be a party. *Semble*, the Treaties of the Crown with the Indian States will continue even after all Indian States enter the Indian Federation to be.

INDEX

A

- Abrogation of treaties, 284-285.
Adair R.,—Cited, 87.
Adoption *Sanads*, 138-139.
Aitchison—referred, 15, 27, 36,
127.
Alwar State, 57, 62.

B

- Banswara State, 57.
Baroda State, 39-44.
Berar Agreements, 183-196.
Bharatpur State, 63, 110.
Bhavnagar State, 81.
Bhopal State, 53, 54.
Bikaner State, 57, 61.
Brierly, T. L.—Cited, 264.
Bundi State, 57.
Butler Committee on Indian
States, 200-202, 237-244.

C

- Cambay, 176.
Cantonments—Agreements re,
169-171.
Cash Contributions, 121, 122,
123.
Cession—of Jurisdiction, 123.
of territories. 123 to 126.
Cochin, 28, 29.
Coinage Agreements, 165-167.
Curzon—Cited, 23, 203.
Customs—Sea and land, 179.
Cutch State, 177.

D

- Davidson Committee, 154-158.
Defensive alliances—interpre-
tation of, 282.
Dhar State, 52.
Dhrangdhara State, 81.
Dhol State, 81.
Doongarpore State, 57.

E

- East India Company—Historical
Background, 20
24.
Status, 24-26.
Exchange of territories, 123-
126.
Extradition arrangements, 139.
Rules.
Treaties, 140-148.

F

- Federation of India, 312.

G

- Gaekwar, Sir Sayaji Rao—Cit-
ed, 308.
Grotius, Hugo—Cited, 86, 204.
Gwalior State, 44-49.

H

- Haksar, Sir K.—Cited, 312.
Hall—Cited, 96, 210.

Holdsworth—Cited, 244.
 Theory examined, 244-250.
 Hydari, Sir Akbar—Cited, 253.
 Hyderabad State, 29-33.

I

Indian States—

Conclusions, 306-312.
 Historical background, 19-84.
 Nature and Status, 85-102, 199.
 Indore State, 49 to 51.
 Interpretation of Treaties, 255-280.
 Ismail, Sir Mirza—Cited, 309.

J

Jaipur State, 57, 59.

Jaisalmer State, 69.

Jammu and Kashmir State, 64-68, 111.

Janjira State, 176.

Jhalawar State, 124-125.

Jodhpur State (Marwar) 57, 61.

Junagadh State, 81.

Jurisdiction—

Cantonments, 170-171.
 Railway land, 135-137.

K

Karauli State, 57.

Kashmir, (See Jammu and Kashmir).

Kathiawar Chiefs, 78, 174.

Keonjhar State, 72, 73.

Kieth, Prof. A. B.—Cited, 253-254.

Kishengarh State, 57.

Kolhapur State, 37-39.

Kotah State, 57.

L

Latthe, A. B.—Cited, 203, 308.

M

McNair—Cited, 98-99, 258.

Maine, Sir Henry—Cited, 81, 205.

Malcolm, 22, 24, 83.

Maritime States, 157, 174.

Mayurbhanj State, 75.

Mediatized States, 82, 84.

Mehta, M. S.—Cited, 234.

Minority Rules, 167-169.

Mint and Coinage Agreements, 165-167.

Miscellaneous Agreements 180-183.

Morvi State, 81.

Mysore State, 33-35, 126.

N

Nizam of Hyderabad, 183-196.

O

Opium Engagements, 152-153.

Oppenheim—Cited, 229.

Orchha State, (Tikamgarh), 55.

Orissa States 70-72, 118.

P

Panikkar, K. M.—Cited, 148.

Paramountcy, Implications of 232-255.

Partabgarh State, 57.

Patiala State, 68.

Periyar Agreement, 182-183.

Peshwa—

Nature and Status, 35-37.

Phillimore—Quoted, 209.

Pollock—Cited, 209.

Porbander State, 81.

Portal conventions, 171-173.

Postal Agreements, 158-160.

Pudukkottah State, 119.

Pufendorf—Cited, 86, 204.

Q

Quasi-international Status of
Indian States, 307.

R

Railway—

Agreements, 128-135.

Jurisdiction, 135-137.

Rajputana States, 56-58.

Ramaswami Iyer, Sir C. P.—Cited,
252.

Ratification of Treaties, 88-89.

Reading, Lord—Letter of, 193.

Rebus Sic Stantibus, 264-269.

Rendition of Residency Bazaars
170-171.

Rewa State, 55.

Royal Assurances, 196-198.

Proclamations, 196-198.

Ruthnaswamy, M.—Cited, 19,
22, 24.

S

Salt Agreements, 153.

Sanads, Nature, of 101, 102.

Unilateral Modification, 77.

Sandur State, 181.

Sapru, Rt. Hon'ble Sir T. B.
Cited, 199.

Sastry, K. R. R.—Cited, 192.

Sawantavadi State, 177.

Sen, D. K.—Cited, 25, 203.

Scott, Sir Leslie—Cited, 210.

Sirohi State, 57.

Sivaswamy Aiyar, Sir P. S.
Cited, 245-246.

Suzerainty, Nature of, 204-205.

T

Telegraph Conventions, 158-
160.

Telephone Conventions, 158-
160.

Territorial integrity clauses,
104-107.

Thanas, the, 202.

Trade agreements, 164-165.

Travancore State, 26-28, 109.

Treaties, Interpretation, of 98-99.
Analysis, classification, of 102-
198.

Nature, of 97-98.

Ratification, of 88-89.

Rebus Sic Stantibus, 264-269.

Obsolescence of, 285-287.

Tributes, 120-123.

Troops, Imperial Service, 160-
164.

Tupper, Sir Lewis—Cited, 206,
207.

U

Udaipur State (Mewar), 57, 58.

V

Varadachariar, N. D.—Cited, 92.

Vattel—Cited, 86, 99.

W

Wadhwan State, 81.

Wankaner State, 81.

Warner, Sir W. Lee—Cited, 15,
207.

Westlake, Prof., Views of, 25,
52, 94, 208.

Wheaton—Cited, 24.

AIDE-de-CAMP'S LIBRARY

Accn. No.....

1. Books may be retained for a period not exceeding fifteen days.